Supreme Court, U.S.
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No. 04-

IN THE

Supreme Court of the United States

DWIGHT VINES and VAN McGRAW,

Petitioners,

v.

UNIVERSITY OF LOUISIANA AT MONROE and BOARD OF SUPERVISORS OF THE UNIVERSITY OF LOUISIANA SYSTEM,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioners initiated private lawsuits against the Respondent state university and its governing board on the basis of age discrimination under the Louisiana antidiscrimination statutes and the Age Discrimination in Employment Act. The Equal Employment Opportunity Commission subsequently filed a lawsuit against the Respondents under the ADEA naming the petitioners as aggrieved individuals and later a class of similarly situated individuals. The Respondents removed the Petitioners' state lawsuit to federal court where it was consolidated with their federal lawsuit and that of the EEOC. Based upon this Court's holding in *Kimel v. Florida Board of Regents*, the federal district court dismissed all of the Petitioners' federal claims and remanded their state lawsuit. The Petitioners proceeded with their state lawsuit, while the EEOC prosecuted its federal case in federal court. The Respondents obtained an adverse decision against the EEOC in federal court and have sought to use that decision to bar the Petitioners from prosecuting their state antidiscrimination claims in state court.

I. Can a circuit court use an adverse decision against the EEOC under the ADEA and find privity between the EEOC and the private plaintiff for the purposes of using res judicata or collateral estoppel to bar the private plaintiffs' claims of age discrimination brought in a separate lawsuit in state court under a state antidiscrimination statute in contravention of 29 U.S.C. § 626(c)(1) and in conflict with the decisions of other circuit courts? The Fifth Circuit's decision directly conflicts with the ADEA's reservation of private suit rights and the Second, Ninth and Eleventh Circuit's rulings in comparable cases where the Second, Ninth and Eleventh Circuits refused to use a final decision involving the EEOC to bar the private state litigation.

II Is a circuit court allowed to ignore the long-established and recognized principles of federalism, equity and comity as outlined by this Court in *Vendo Co. v. Lecktro-Vend Corp.* by granting an injunction on the basis of res judicata and collateral estoppel when the state courts have evaluated these issues as required under federal jurisprudence and reached a different result? The Louisiana state courts properly examined the federal jurisprudence concerning res judicata and collateral estoppel to determine whether privity existed between the EEOC and the private plaintiffs and determined that there was no privity, so res judicata and collateral estoppel could not bar their private state law claims.

III. Can a circuit court be allowed to depart from this Court's precedent in *Anderson v. City of Bessemer City, NC* by substituting its factual conclusions for those of the district court without showing that the district court's findings of fact are clearly erroneous? The Fifth Circuit did not pay proper deference to the decision of the district court to deny the injunction under the relitigation exception to the Anti-Injunction Act, as this Court explained in *Chick Kam Choo v. Exxon Corp.*

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Dr. Dwight Vines and Dr. Van McGraw (Petitioners) respectfully petition this Court for a writ of certiorari to review the erroneous opinion of the United States Court of Appeals for the Fifth Circuit, Case No. 03-31172, dated January 28, 2005. The circuit court's opinion deviates from the clear directive of § 626(c)(1) of the ADEA and from the decisions of the Second, Ninth and Eleventh Circuit Courts as well as this Court's well-established decisional law concerning the imposition of the relitigation exception to the Anti-Injunction Act and the standards for review by a circuit court.

OPINIONS BELOW

On January 28, 2005, the United States Court of Appeals for the Fifth Circuit issued its opinion (published at 398 F.3d 700) (Pet. App. at 1a) reversing the district court's November 10, 2003 order; the district court's ruling (Pet. App. at 24a) denied the Respondents an injunction based upon the lack of privity between the EEOC and the Petitioners with respect to the Petitioners' state law claims, as outlined in the Report and Recommendation by the Magistrate Judge. (Pet. App. at 26a). The United States Court of Appeals for the Fifth Circuit denied Petitioners' request for rehearing on March 2, 2005. (Pet. App. at 32a). The order denying rehearing is not otherwise published. The opinion of the Louisiana Second Circuit Court of Appeal denying Respondents' peremptory exception of res judicata and/or collateral estoppel is reported at *Vines and McGraw v. Northeast Louisiana University, et al.*, 839 So.2d 979 (La. App. 2d Cir. 2003), *writ denied*, 853 So.2d 638 (La. 2003).

STATEMENT OF JURISDICTION

The certiorari jurisdiction of this Court is invoked in conformity with 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS

Respondents sought an injunction against the Petitioners under the relitigation exception to the Anti-Injunction Act, 28 U.S.C. § 2283. The pertinent part of § 2283 is that a "court of the United States may not grant an injunction to stay proceedings in a State

court except as expressly authorized by Act of Congress, or where necessary, in aid of its jurisdiction, or to protect or effectuate its judgments."

Petitioners assert that § 626(c)(1) of the ADEA is important for understanding the privity issue, which is as follows:

> (c)(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: *Provided*, That the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter.

Federal Rule of Civil Procedure Rule 52(a) also supports Petitioners' position that the circuit court erred by not deferring to the factual findings of the district court. The material part of Rule 52(a) is the following:

> (a) Effect. [F]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

STATEMENT OF FACTS

Dr. Vines and Dr. McGraw retired from their positions respectively as President of ULM and Dean of the College of Business Administration. At the time of their retirements, they were working in the administration and performing many management and supervisory duties with little or no time to teach college classes. Dr. Vines and Dr. McGraw had worked well past the minimum requisite number of years to qualify for retirement benefits under the Teachers' Retirement System of Louisiana (TRSL). The TRSL rules provide specifically for such situations with terms designating the reimbursement to the system of a percentage of benefits if the

reemployed state retiree is paid beyond a certain amount. La. R.S. 11:707.[1]

When Petitioners returned to ULM, they taught college classes only. They maintained the requisite load for their positions as professors and taught classes at all levels in the College of Business Administration. The Petitioners contended that they should have been paid commensurate with the teaching loads that they maintained, not based upon their status as retirees. After several years, ULM fired the Petitioners based upon the Board's new policy prohibiting the employment of state retirees.

Petitioners instituted a lawsuit on May 5, 1997 in the U.S. District Court for the Western District of Louisiana in which they alleged that Respondents, ULM and the Board of Trustees, violated the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* (ADEA) and the Louisiana antidiscrimination statutes, La. R.S. 23:971 and 51:2232, *et seq.* with respect to their wages and their ultimate terminations.[2] Within several days, the Petitioners simultaneously filed a lawsuit in the Louisiana state court for causes of action under the ADEA and the Louisiana antidiscrimination statutes. ULM removed the state lawsuit to federal court and the two cases were consolidated. Subsequently the EEOC instituted its own action in Federal Court after its investigation of Dr. Vines and Dr. McGraw's charges of discrimination. In the EEOC's lawsuit, the EEOC claimed that ULM maintained a policy of paying state retirees lower wages and that they were assigned greater workloads than those who were not state retirees in violation of the ADEA. The EEOC's lawsuit also was consolidated with the earlier action of Dr. Vines and Dr. McGraw.

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1. The Louisiana Legislature repealed La. R.S. 11:707 effective July 1, 2002.

2. Following the filing of the pertinent lawsuits herein, the Louisiana legislature amended the statutes and combined the antidiscrimination laws into one statute entitled the Louisiana Employment Discrimination Law, La. R.S. 23:301, *et seq*. The amendment and recodification of these statutes does not bear upon the question of the applicability of res judicata or collateral estoppel in the instant case.

The U.S. District Court on August 6, 1999 dismissed Dr. Vines and Dr. McGraw's state law claims on the basis of prescription, thereby leaving only their federal claims viable. In *Kimel v. Florida Board of Regents*, 528 U.S. 62, 120 S. Ct. 631 (2000), this Court concluded that in allowing individuals to sue the states under the ADEA, Congress had exceeded constitutional bounds. Respondents moved for summary judgment in the consolidated federal lawsuit on all claims against them as Defendants under the ADEA. The federal court determined that *Kimel* applied only to Dr. Vines and Dr. McGraw's ADEA claims, but not to those of the EEOC. On June 1, 2000, the Federal Court vacated its prior decision dismissing Dr. Vines and Dr. McGraw's state law claims and specifically remanded the Plaintiffs' state law claims back to the Louisiana state court.

During the ensuing year, the EEOC, Respondents and Petitioners pursued discovery. Citing the Board of Supervisors' policy, the EEOC, pursuant to its authority under the ADEA, expanded the scope of alleged aggrieved victims to all state retirees who had been employed by the Respondents at lower wages or were rejected or terminated from employment due to their status as state retirees. The EEOC stated that there were approximately 335 "aggrieved individuals" for whom it would seek relief and estimated potential damages as multiples of millions of dollars. The trial in the Federal Court was scheduled to occur during June 2001, but Respondents filed a Motion for Summary Judgment seeking the dismissal of the EEOC's case against it. The EEOC also filed a Motion for Summary Judgment against Respondents. The U.S. District Judge referred the motions to the Magistrate Judge for a Report and Recommendation. The Magistrate Judge returned the Report and Recommendation in which both parties' Motions for Summary Judgment were denied and found that there were sufficient issues of material fact about disparate impact as to the policy and disparate treatment of the Petitioners on the basis of their age in violation of the ADEA. The District Judge rejected this report and granted the Respondents' Motion for Summary Judgment and dismissed the EEOC's lawsuit against Respondents.

The EEOC filed a Notice of Appeal to the Fifth Circuit. The EEOC received an extension of time to file its brief from its due date on the day after Thanksgiving 2001, and the briefing period was extended to December 26, 2001. The appellate division of the EEOC in Washington, D.C. chose to dismiss its appeal immediately before its briefing deadline of December 26.

ULM had filed a peremptory exception of res judicata and/or collateral estoppel with the Louisiana state court. The Louisiana trial court decided that the peremptory exception of res judicata should be granted on the basis that the EEOC was acting in privity with the Petitioners in the federal court action and that the federal case and the state case were based on the same nucleus of operative facts. The Petitioners appealed this decision to the Louisiana Second Circuit Court of Appeals. The Louisiana Second Circuit reversed the decision of the trial court and determined that the EEOC was not in privity with the Petitioners for their state court action and that the peremptory exception on the basis of res judicata or collateral estoppel did not apply. *Vines and McGraw v. Northeast Louisiana University, et al.*, 839 So.2d 979 (La. App. 2d Cir. 2003), *writ denied*, 853 So.2d 638 (La. 2003). Seeking to overturn this decision, Respondents petitioned the Second Circuit for an en banc hearing. The Respondents then applied for a writ of certiorari to the Louisiana Supreme Court. The Louisiana Supreme Court denied their writ application on September 19, 2003.

On May 20, 2003, Respondents filed with the U.S. District Court for the Western District of Louisiana a motion under the relitigation exception of the Anti-Injunction Act, 28 U.S.C. § 2283, seeking to enjoin the Plaintiffs' lawsuit in the Louisiana state court. Respondents based their request on the July 18, 2001 decision of the U.S. District Court in favor of the Respondents and against the Equal Employment Opportunity Commission. The Magistrate Judge issued a report and recommendation to deny the permanent injunction on the basis that there was no privity between the EEOC and the Plaintiffs herein. The U.S. District Court accepted the Magistrate Judge's report and recommendation and denied the

permanent injunction. Respondents appealed the decision to the Fifth Circuit which reversed the District Court and directed the granting of the injunction.

REASONS FOR GRANTING THE PETITION

I. Certiorari Should Be Granted To Correct The Fifth Circuit's Determination That Privity Exists Between The Eeoc And Private Litigants So As To Impose The Relitigation Exception To The Anti-injunction Act And Bar Their Previously Filed State Action.

The EEOC, as an agency of the United States government, is vested with litigation authority only for the United States as a public policy vehicle for the enforcement of the laws of the United States, not for the vindication of litigants' private **state law claims** of discrimination. When Petitioners were expelled from the federal case based upon this Court's ruling in *Kimel*, the federal court recognized the continued existence of Petitioners' state law claims in its order remanding their case to the state court. When this Court determined in *Kimel v. Florida Board of Regents*, 528 U.S. at 91-2, 120 S. Ct. at 650 that the ADEA did not validly abrogate the states' Eleventh Amendment immunity from suit by private individuals, the Court specially commented that private plaintiffs retain their right to sue a state government under a state antidiscrimination statute. "State employees are protected by state age discrimination statutes, and may recover money damages from their state employers, in almost every State of the Union. Those avenues of relief remain available today, just as they were before this decision." Furthermore, the ADEA in 29 U.S.C. § 626 specifically states that an individual's right to bring an action terminates upon the EEOC initiating its action. Otherwise, if a private plaintiff files an action before the EEOC, then the individual is allowed to maintain the action despite the EEOC's suit.

The U.S. District Court and the Louisiana Second Circuit have determined that there was no privity between the EEOC and Petitioners such that the doctrines of res judicata or collateral estoppel would bar Petitioners' pursuit of their state court lawsuit. The U.S.

District Court also explained that the EEOC's failure to pursue its appeal of the federal court dismissal demonstrated that it failed to adequately represent the interests of Petitioners such that it could not be considered to be in privity with them.

The U.S. District Court's denial of Respondents' motion for a permanent injunction is correct because there was no privity between the Petitioners and the EEOC. Without privity with respect to the party against whom the rule is to be applied, neither res judicata nor collateral estoppel can bar the Plaintiffs from litigating their state law claims in the Louisiana court.

A. The Exceptions to the Anti-Injunction Act Are to Be Narrowly Construed and the Relitigation Exception Is Based upon the Concepts of Res Judicata and Collateral Estoppel.

The Anti-Injunction Act, originally passed in 1793, states that a "court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary, in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283. The third exception is known as the "relitigation exception."

This Court has noted that while the exceptions are useful for the system of federal law, they are to be strictly interpreted. "These exceptions are designed to ensure the effectiveness and supremacy of federal law. But as the Court has recognized, the exceptions are narrow and not [to] be enlarged by loose statutory construction." *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 137, 146, 108 S. Ct. 1684, 1689 (1988). Essentially, the relitigation exception ". . . is founded in the well-recognized concepts of res judicata and collateral estoppel." *Chick Kam Choo*, 486 U.S. at 147, 108 S. Ct. at 1690. In its prior decisions, the Fifth Circuit has followed these principles. *See Quintero v. Klaveness Ship Lines*, 914 F.2d 717 (5th Cir. 1990); *Santopadre v. Pelican Homestead & Savings Association*, 937 F.2d 268 (5th Cir. 1991); and *Baris v. Suplicio Lines, Inc.*, 74 F.3d 467 (5th Cir. 1996). As this Court explained in *Chick Kam Choo*, the party seeking the injunction

bears the burden of proving the qualification for, and the necessity of, the injunction. Furthermore, the evaluation must be strictly construed. Petitioners suggest that there is more than ample reason to deny the injunction because the conditions of res judicata or collateral estoppel do not apply.

The Fifth Circuit has outlined a four-part test to evaluate when the relitigation exception can apply to bar a claim in a state court lawsuit, as follows:

> (1) 'the parties in a later action must be identical to (or at least in privity with) the parties in a prior action';
>
> (2) 'the judgment in the prior action must have been rendered by a court of competent jurisdiction';
>
> (3) 'the prior action must have concluded with a final judgment on the merits'; and
>
> (4) 'the same claim or cause of action must be involved in both suits.'

Vasquez v. Bridgestone/Firestone, Inc., 325 F.3d 665, 675-76 (5th Cir. 2003); *Regions Bank of Louisiana v. Rivet*, 224 F.3d 483, 488 (5th Cir. 2000). These requirements equate to an assessment of res judicata if all exist. *N.Y. Life Ins. Co. v. Gillispie*, 203 F.3d 384, 387 (5th Cir. 2000).

Having the opportunity to litigate the cause of action or issue is necessary to satisfy the demands of due process in applying res judicata or collateral estoppel against a party. This Court in *Montana v. United States*, 440 U.S. 147, 153-55, 99 S. Ct. 970, 59 L. Ed. 2d 210 (1979) and in *Blonder-Tongue Lab., Inc. v. University of Ill. Found.*, 402 U.S. 313, 332-33, 91 S. Ct. 1434, 28 L. Ed. 2d 788 (1971) outlined four factors, all of which must be satisfied, in order to apply collateral estoppel or issue preclusion: (1) identity of the issues in a prior proceeding; (2) the issues were actually litigated; (3) the determination of the issues was necessary to the resulting judgment; and (4) the party defending against preclusion had a full and fair opportunity to litigate the issues. *See also Jet, Inc. v. Sewage Aeration Systems*, 223 F.3d 1360, 1365-66 (Fed. Cir. 2000).

This Court in *Blonder* explained, "Some litigants–those who never appeared in a prior action–may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issues which stand squarely against their position." *Blonder*, 402 U.S. at 329, 91 S. Ct. at 1443, citing *Hansberry v. Lee*, 311 U.S. 32, 40, 61 S. Ct. 115, 117, 85 L. Ed. 22 (1940). In *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 320, 328, 99 S. Ct. 645, 650, 58 L. Ed. 2d 552 (1979), this Court endorsed its reasoning in *Blonder*. "Although neither judges, the parties, nor the adversary system performs perfectly in all cases, the requirement of determining whether the party against whom an estoppel is asserted had a full and fair opportunity to litigate is a most significant safeguard." *Parklane*, 439 U.S. at 328, 99 S. Ct. at 650, citing *Blonder*, 402 U.S. at 329, 91 S. Ct. at 1443.

In addition to checking whether each of the requirements is present, the Court also must consider whether ". . . the principles of equity, comity, and federalism supported its issuance of an injunction." *Regions Bank*, 224 F.3d at 489. The Anti-Injunction Act does not "'qualify in any way the principles of equity, comity, and federalism that must [in its absence] restrain a federal court when asked to enjoin a state court proceeding.'" *Regions Bank*, 224 F.3d at 489, quoting *Regional Properties, Inc. v. Financial & Real Estate Consulting Co.*, 678 F.2d 5522, 566 (5th Cir. 1982), quoting *Mitchum v. Foster*, 407 U.S. 225, 243, 92 S. Ct. 2151, 32 L. Ed. 2d 705 (1972).

To the extent that there is any uncertainty as to the issuance of the permanent injunction, ". . . any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy." *Atlantic Coast Railroad Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 297, 90 S. Ct. 1739, 1748, 26 L. Ed. 2d 234, 243 (1970). *See also Texas Employers' Insurance Association v. Jackson*, 862 F.2d 491, 499 (5th Cir. 1988) and *Regions Bank*, 224 F.3d at 495.

The application of the exceptions to the Anti-Injunction Act are to be guided by this principle. *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 628, 630-33, 97 S. Ct. 2881, 2887-88 (1977). The use of the exceptions to the Anti-Injunction Act is permissive and whether to issue such an injunction lies within the discretion of the Court. *St. Paul Mercury Insurance Co. v. Williamson*, 332 F.3d 304, 308-09 (5th Cir. 2003).

The Respondents will not be irreparably harmed from having to participate in the state court lawsuit, a situation which already had been contemplated by the U.S. District Court by its remand of the Petitioners' state lawsuit. The Louisiana Courts have appropriately considered the Respondents' arguments concerning res judicata and collateral estoppel at the trial court level, at the level of the Second Circuit, both on appeal and on rehearing, and at the level of the Louisiana Supreme Court with their writ of certiorari on this question of law. The Louisiana courts should be allowed to hear the Petitioners' state lawsuit which concerns claims under the Louisiana antidiscrimination statutes. What the Petitioners are seeking with their state lawsuit is to have their day in court on their own age discrimination claims, to have their own turn to make their arguments to the court.

B. The District Court Correctly Denied the Permanent Injunction Requested by the Defendants Barring the Plaintiffs from Prosecuting Their State Law Claims because It Is Not within the Relitigation Exception to the Anti-Injunction Act.

The decision of the U.S. District Court referred to *Victa v. Merle Norman Cosmetics, Inc.*, 19 Cal. App. 4th 454, 24 Cal. Rptr. 2d 117 (1993) because of its similarity to the factual circumstances herein. (Pet. App. at 27a). The plaintiff in *Victa* had filed a lawsuit against a private employer in the California state court alleging a violation of California's statute prohibiting age discrimination. The EEOC subsequently filed an action in the U.S. District Court based upon the plaintiff's charge of discrimination for which it sought both general compensatory damages for the plaintiff

as well as injunctive relief. Eventually the EEOC expanded the lawsuit to seek damages for a class of individuals allegedly similarly affected by the discrimination. The matter in the federal lawsuit concluded with the EEOC choosing to dismiss the matter with a settlement that allowed only injunctive relief against the defendant and allowed no damages for the plaintiff, or any members of the class.

Similarly herein, Dr. Vines and Dr. McGraw filed their state court and federal lawsuits prior to that of the EEOC in which they alleged violations the Louisiana antidiscrimination statute and the ADEA. The EEOC later filed its own action based upon the Petitioners' charges of discrimination and ultimately expanded it to a class action. Following this Court's decision in *Kimel*, Dr. Vines and Dr. McGraw's federal lawsuit was dismissed and their state law claims were remanded to the Louisiana court. Petitioners participated in discovery in their capacity as private litigants in their own federal and state lawsuits. They lacked control over the EEOC's conduct of its federal action. Just as the EEOC agreed to final judgment dismissing the case in *Victa* with minimal injunctive relief and no damages for the plaintiffs or alleged class, the EEOC in the federal case naming Dr. Vines and Dr. McGraw as aggrieved individuals summarily failed to brief the appeal which it filed from the District Court's judgment, a decision distinctly adverse to the interests of Dr. Vines and Dr. McGraw and over which they had no control.

Before proceeding in the California state court to try to stop the plaintiff, the defendants in *Victa* attempted to obtain an injunction from the U.S. District Court for the Central District of California on the basis of the relitigation exception to the Anti-Injunction Act, just as Respondents herein have done. Citing *Chick Kam Choo*, the U.S. Ninth Circuit Court of Appeals refused to reverse the U.S. District Court's denial of the injunction because any issuance was permissive and not mandatory. "As the Supreme Court noted, 'the fact that an injunction *may* issue under the Anti-Injunction Act does not mean that it *must* issue." *Merle Norman Cosmetics, Inc. v. Victa*, 936 F.2d 466, 468 (9th Cir. 1991), *citing Chick Kam Choo*, 486 U.S. at 140, 108 S. Ct. at 1692.

In the federal *Victa* case, the Ninth Circuit reiterated the need to utilize the doctrines of equity, comity and federalism in evaluating whether to grant an injunction. *Merle Norman Cosmetics*, 936 F.2d at 468, citing *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 526, 106 S. Ct. 768, 773, 33 L. Ed. 2d 877 (1986), citing *Mitchum*, 407 U.S. at 243, 92 S. Ct. at 2162. The Ninth Circuit explained the following:

> In applying these principles, the district court acted entirely within its discretion when it determined that because nothing prevented Merle Norman from raising its defenses of res judicata and collateral estoppel in the California courts, it would not issue an injunction. State courts are just as capable as federal courts in applying applicable law. Doubts about the propriety of an injunction should be resolved 'in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy.'

Merle Norman Cosmetics, 936 F.2d at 468, citing *Bechtel Petroleum v. Webster*, 796 F.2d 252, 253 (9th Cir. 1986), which is quoting *Vendo Co. v. Lecktro-Vend Corp.*, 433 U.S. 623, 630, 97 S. Ct. 2881, 2887, 53 L. Ed. 2d 1009 (1977).

The U.S. District Court Judge and the Magistrate Judge who handled the litigation between the Respondents and the EEOC and for a time, the Petitioners, were well-acquainted with the facts and circumstances surrounding the procedural and evidentiary history in the case. With this background, the U.S. District Judge accepted the Magistrate Judge's Report and Recommendation which quoted extensive passages from the Louisiana Second Circuit's opinion. These excerpts focused on the dismissal of the Petitioners from the federal case based upon the decision in *Kimel* and the remand of their claims to state court, as contemplated by *Kimel*. Further, it noted that the EEOC lacked standing to prosecute the Petitioners' state law claims:

> In this matter, after the Supreme Court decision in *Kimel*, the plaintiffs did not have the right to individually maintain

> an ADEA claim against a state agency. After *Kimel*, only the EEOC could prosecute the ADEA claim against the defendants in this case. Because the plaintiffs' individual ADEA claims had to be dismissed on those ground, the federal court no longer had jurisdiction over the state claim which had been asserted by the plaintiffs. The matter was remanded to the state court. However, the *Kimel* decision specifically recognized the right of employees to sue under state statutory schemes. While the EEOC was the proper party to assert the ADEA claim, that agency did not prosecute any claim under state law. Further, as in *Victa*, there is no showing that the EEOC had standing to prosecute such a claim under Louisiana law.

(Pet. App at 27a-28a).

The Louisiana Second Circuit reviewed the federal cases involving the existence of privity between parties, including *General Telephone Company of the Northwest, Inc. v. EEOC*, 446 U.S. 318, 330, 100 S. Ct. 1698, 64 L. Ed. 2d (1980). This Court in *General Telephone* explained that the EEOC can sue without the necessity of class certification under the Federal Rules of Civil Procedure and that its right to do so is in addition to private suit rights. This Court noted that the EEOC acts to vindicate the public interest and that its interests are broader than those of the individuals injured by discrimination. Because of this purpose, this Court found that EEOC judgments would not have automatic res judicata effect.

Noting that *General Telephone* involved a Title VII case and not one under the ADEA, the Second Circuit also reviewed the decision in *EEOC v. U.S. Steel Corp.*, 921 F.2d 489 (3d Cir. 1990), as had the court in *Victa*. The Second Circuit noted that

> The Third Circuit found that there was privity with individuals when the EEOC seeks individual relief on behalf of grievants under the ADEA, but there may not be when the EEOC seeks to enjoin discrimination affecting an entire class. The court reasoned that 'privity'

> is a word used to say that the relationship between one who is a party on the record and another is close enough to include that other within the *res judicata.*

The situation is *U.S. Steel* specifically addressed the question of a suit brought after the initial case by a party considered in a representative capacity. However, the Second Circuit noted that the *Victa* court correctly distinguished the circumstance of barring a lawsuit filed subsequently from that which exists when a case is initiated prior to the one from which a party seeks to derive the res judicata or collateral estoppel effect because 29 U.S.C. § 626(c)(1) does not cut off the private suit rights of individuals who brought state law action or ADEA suits before the EEOC sues.

Recognizing that the *Victa* decision is not precedential, the Louisiana Second Circuit found its reasoning persuasive, noting as follows:

> There was no privity between the EEOC and the plaintiffs in the present case. In this matter, after the Supreme Court decision in *Kimel*, the plaintiffs did not have the right to individually maintain an ADEA claim against a state agency. After *Kimel*, only the EEOC could prosecute the ADEA claim against the defendants in this case. Because the plaintiffs' individual ADEA claim had to be dismissed on those grounds, the federal court no longer had jurisdiction over the state claim which had been asserted by the plaintiffs. The matter was remanded to the state court.
>
> However, the *Kimel* decision specifically recognized the right of employees to sue under state statutory schemes. While the EEOC was the proper party to assert the ADEA claim, that agency did not prosecute any claim under state law. Further, as in *Victa*, there is no showing that the EEOC had standing to prosecute such a claim under Louisiana law.

Vines, 839 So.2d at 986-87.

Noting that the EEOC also in its federal lawsuit had expanded the class of victims to other similarly situated individuals, the District Court and the Second Circuit explained that as in *Victa*, the EEOC was not prosecuting the case only concerning the named aggrieved employees, specifically Dr. Vines and Dr. McGraw, but ". . . the commission was, in effect, representing the general public interest rather than those of the plaintiffs." The District Court and the Second Circuit then determined, "Therefore, even under the reasoning of *EEOC v. United States Steel Corporation*, *supra*, it appears that the EEOC was not in privity with the plaintiffs because it sought to enjoin discrimination against a class of victims, not just the plaintiffs." Dr. Vines and Dr. McGraw also had maintained that they lacked control over the conduct of the action in federal court by the EEOC. The District Court and the Second Circuit specifically agreed with this position, finding that "They had no control over bringing or maintaining the ADEA action or in dismissing the appeal of the judgment against the EEOC." (Pet. App. at 28a).

In its opinion, the Fifth Circuit declares that the EEOC is Petitioners' representative and as such, in privity with Petitioners so as to allow preclusive effect from the adverse EEOC decision because there was no "clear divergence of interests" between Petitioners and the EEOC, a criterion established by the Fifth Circuit.

> In a situation where there is a clear divergence of interests between the EEOC and the aggrieved individual, we must determine in each case whether privity exists. This is not the situation in the present case and we express no view regarding the question of whether the doctrine of representative claim preclusion would apply in such case.

(Pet. App. at 10a-11a). The Fifth Circuit concludes, "Unlike in *Victa*, the EEOC in this case never abandoned the interests of the individual plaintiffs. The EEOC acted as Vines' and McGraw's representative in seeking monetary, 'make-whole' relief in the federal case, the same relief they now seek in their state court action." However, the District Court assessed the factual circumstances that demonstrated the divergence of interests between the EEOC and Petitioners and

specifically concluded that there was no privity between the Petitioners and the EEOC. These factual circumstances included the EEOC's failure to proceed with its appeal of the adverse decision, clearly abandoning Petitioners' interests in doing so. (Pet. App. at 28a-29a).

The Fifth Circuit also erred because it fails to realize that the EEOC, a federal agency, never has been authorized to represent individuals concerning their individual causes of action under state law, even if those claims involve age discrimination. Congress only authorized the federal EEOC to litigate on behalf of individuals, as well as the public interest, for claims under the federal statutes pertaining to discrimination, including the ADEA and Title VII of the Civil Rights Act of 1964. This understanding underlies the U.S. District Court's conclusion that the EEOC was not Petitioners' representative with respect to their state law age discrimination causes of action. Because the EEOC cannot be Petitioners' representative for their state law claims, there is no privity between the EEOC in the first action in U.S. District Court and the second lawsuit under state law in the Louisiana court. Congress only authorized the EEOC to represent individuals with respect to the ADEA. Furthermore, under the ADEA, private plaintiffs who file a lawsuit prior to that of the EEOC retain their right to proceed on their own behalf even with a claim under the ADEA, thereby proscribing the limits of the EEOC's authority. 29 U.S.C. § 626(c)(1). The Fifth Circuit's decision to declare the EEOC to be the Petitioners' representative for their state law claims amounts to an impermissible extension of the Federal EEOC's representative authority to state antidiscrimination statutes. The statutory scheme of the ADEA specifically is designed to respect the existence and development of state statutes against age discrimination. Section 626(c)(1) of the ADEA specifically preserves the right of an individual to maintain a private lawsuit that was begun prior to the EEOC's lawsuit, as Petitioners had done. Section 633 of the ADEA in particular recognizes this by allowing for a delay period within which a state can conduct proceedings under its own state age discrimination statute, similar to that provision in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5.

All of the cases cited by the Fifth Circuit limited the EEOC's ability to prosecute a case under the federal ADEA by virtue of an individual having limited his rights in some manner, either by agreement or settlement. *EEOC v. U.S. Steel Corp.*, 921 F.2d 489 (3d Cir. 1990); *EEOC v. Harris Chernin, Inc.*, 10 F.3d 1286 (7th Cir. 1993); *EEOC v. Kidder, Peabody & Co.*, 156 F.3d 298 (2d Cir. 1998) and *EEOC v. Waffle House*, 534 U.S. 279, 122 S. Ct. 754, 151 L. Ed. 2d 755 (2002). None of these cases involved the extension of the representative capacity of the EEOC to a private individual's claims for age discrimination under state law. No court has ever found that res judicata or collateral estoppel should apply to a private individual's case for claims under a state antidiscrimination statute following the EEOC's litigation of a case under the ADEA. There is no legal precedent for the declaring the EEOC to be the representative of individuals who are pursuing a previously filed state lawsuit with state antidiscrimination claims.

There were no means available to Dr. Vines and Dr. McGraw to advance their state claims within the same action in which the EEOC was addressing the alleged ADEA violations by Respondents. Using res judicata or collateral estoppel to bar a plaintiff's state lawsuit for state law claims with res judicata or collateral estoppel when there is another action by a federal agency based upon a federal cause of action allows the defendant conceivably to control which forum, federal or state, adjudicates the claims and issues and against which party plaintiff the Defendant seeks to do battle. Denying the Petitioners the ability to advance their case within the Louisiana courts denies them due process.

In order to satisfy the requirements of due process to utilize res judicata or collateral estoppel as a bar to a plaintiff's claim, the position of the representative must be clearly recognized as such by the plaintiff by virtue of some defined legal statutes, through alignment of issues or through notice to the class to be represented. *Parklane Hosiery*, 439 U.S. at 326, 99 S. Ct. at 645, 58 L. Ed. 2d at 552 (1979). *The Restatement (Second) of Judgments* § 41(1) outlines the representational theory of preclusion and explains that a person is considered to be represented by another party who is ". . . (d) an

official or agency invested by law with authority to represent the person's interests. . ." To the extent that the EEOC can be considered the representative of the Plaintiffs, such recognition must be restricted to that defined in the statute allowing it to sue, that is, the ADEA, 29 U.S.C. § 629, *et seq*. The ADEA only allows the EEOC prosecutorial authority with respect to causes of action brought under ADEA, not state statutes. Further, under § 626(c)(1), the EEOC's representation is circumscribed when an individual files a lawsuit before that of the EEOC, as occurred herein.

The ADEA specifically adopted various procedures of the FLSA, as this Court explained in *Lorillard v. Pons*, 434 U.S. 573, 98 S. Ct. 866 (1978). *See also LaChapelle v. Owens-Illnois, Inc.*, 513 F.2d 286 (5th Cir. 1975). Subsequently, in *Donovan v. University of Texas at El Paso*, 643 F.2d 1201 (5th Cir. 1981), the Fifth Circuit considered whether an action brought by the government (subsequently the EEOC) for violations of the FLSA and the Equal Pay Act was governed by Fed. R. Civ. P. 23 requiring class action certification. The Court reviewed the purposes of mandating Rule 23 class certification, including avoiding multiple lawsuits on common claims resulting in inconsistent decisions and the problems in deciding the res judicata effects of a judgment. *University of Texas*, 643 F.2d at 1206-07. The Fifth Circuit explained that the statutory structure of FLSA enforcement procedures differed in salient ways which emphasized why Rule 23 need not be imposed in FLSA suits. The Court noted that the FLSA provision § 16(c) stipulates that an employee loses the right to sue once the Secretary files a complaint. Furthermore, the claims of all employees who had not already filed a lawsuit are consolidated at the time the Secretary files an action. "The right of an affected employee to *commence* or become a party plaintiff in a private action terminates, 29 U.S.C.A. § 216(b), (c), but *previously* filed private litigation by employees are not affected." *University of Texas*, 643 F.2d at 1207. In concluding the opinion, the Fifth Circuit specifically found that "Finally, *res judicata* problems are also precluded by FLSA procedures because the Secretary sues on behalf

of and judicially binds *all* employees in those categories which have not previously filed private actions." *University of Texas*, 643 F.2d at 1208.

The appellants in *Dunlop v. Pan American World Airways Inc.*, 672 F.2d 1044 (2d Cir. 1982) sought an order declaring that the portion of the settlement and stipulated dismissal by the Secretary of Labor and the employer in a federal ADEA action which barred the appellants' state lawsuit claims did not have preclusive effect on their state age discrimination suit. The Second Circuit agreed that the appellants' state lawsuit for violation of the state's antidiscrimination law could not be eliminated through the Secretary's actions. Referring to the pertinent part of the ADEA, § 14(a) 29 U.S.C. § 633(a), the Second Circuit explained in footnote 7 that this section ". . . provides only that the commencement of a federal action shall 'supersede' state claims. The legislative history is clear that this language only empowers the Secretary to stay state proceedings, not to dismiss them." *Dunlop*, 672 F.2d at 1047. The Court directed that an order issue removing the preclusive effects from the stipulated dismissal.

In *EEOC v. Eastern Airlines, Inc.*, 736 F.2d 635 (11th Cir. 1984), Patricia Gorman filed a charge of age discrimination under the ADEA. She then instituted a private lawsuit in federal court in Minnesota. The EEOC later filed an action in federal court in Florida alleging that Eastern had violated the ADEA in the hiring of flight attendants. The EEOC named Ms. Gorman as one of the charging parties. Ms. Gorman's case later was consolidated with the EEOC case and transferred to Florida. The EEOC conducted much of the discovery and handled settlement negotiations which resulted in the EEOC and Eastern entering into a consent decree. Ms. Gorman refused to dismiss her pending suit against Eastern. In the federal district court, she tried to intervene in the EEOC case and vacate the consent decree. The Court noted:

> Additionally, we disagree with Eastern's conclusion that Congress intended for an EEOC action enforcing the ADEA to cut off previously instituted private ADEA

> actions. Such a policy clearly would discourage attorneys from agreeing to file private ADEA actions on behalf of aggrieved individuals, since any such suit, no matter how close to resolution, or how much time spent, could be cut off by the EEOC filing a similar suit. At the same time, § 7(c)(1) serves a useful purpose by preventing the filing of 'copycat' suits by attorneys who only follow the EEOC's lead, hoping to reap the benefits of the EEOC's success.

Eastern, 736 F.2d at 640. The Court utilized the Second Circuit's analysis in *Burns v. Equitable Life Assurance Society of the United States*, 696 F.2d 21 (2d Cir. 1982), *cert. denied*, 104 S. Ct. 336 (1983) determining that the reference "to bring" a private action means only "to commence" rather than to "commence or maintain" and that § 7(c)(1) only stops an individual's right to commence or file a lawsuit, not to continue an ongoing case. The Eleventh Circuit held that

> . . . Gorman's private ADEA action against Eastern, commenced prior to the EEOC's suit naming Gorman as a charging party, remains viable at this time. Gorman is free to continue with her suit, or if she prefers, to dismiss her suit pursuant to the EEOC/Eastern consent decree and participate in the relief provided under the terms of that settlement.

Eastern, 736 F.2d at 640-41. A similar result was reached in *Merle Norman Cosmetics, Inc. v. Victa*, 936 F.2d 466 (9th Cir. 1991) when the Ninth Circuit affirmed the District Court's denial of an injunction under the relitigation exception to the Anti-Injunction Act. The Eleventh Circuit in *Riddle v. Cerro Wire and Cable Group, Inc.*, 902 F.2d 918 (11th Cir. 1990) explained that the EEOC and an individual's interests can conflict or diverge. When that divergence of interests occurs, the Eleventh Circuit concluded that privity cannot exist under such circumstances, and private individuals should maintain their own action separate from that of the EEOC. The statutory construction of the ADEA and the FLSA demonstrate that

there is no res judicata effect from a decision on an EEOC action for a lawsuit filed by a private plaintiff prior to the EEOC's action. The Fifth Circuit has so held in *University of Texas* and as have other circuits. This Court has articulated the viability of private litigants' state law antidiscrimination claims in *Kimel*.

The Eleventh Circuit in *Riddle* explained that the Fifth Circuit's holding in *Jones v. Bell Helicopter Co.*, 614 F.2d 1389 (5th Cir. 1980) was incorrect in applying res judicata effect from a decision adverse to the EEOC. Noting that the EEOC and an individual interest's can conflict or diverge, the Eleventh Circuit concluded that privity cannot exist under such circumstances. The Eleventh Circuit noted,

> Moreover, the *Jones* case did not take into account the Supreme Court's analysis of the relationship between the EEOC and the aggrieved individual, explained in *General Telephone*. The Court indicated in *General Telephone* that the interests of the EEOC and of the individual may be divergent; the Court's analysis undercuts any attempt to expand the *Jones* holding to support a proposition that the aggrieved individual and the EEOC are *always* in privity.

Riddle, 902 F.2d at 923 n.6.

The Eleventh Circuit recently reasserted the viability of this analysis from *Riddle* in *EEOC v. Pemco Aeroplex*, 383 F.3d 1280 (11th Cir. 2004) when in dicta it noted that not only would the EEOC not be found in privity with individuals who had litigated first, but that comparably, these individuals would not necessarily be found to be in privity with the EEOC if the agency's action concluded first.

In finding that an EEOC action did not have to be certified under Federal Rule 23, this Court specifically explained the following:

> These private-action rights suggest that the EEOC is not merely a proxy for the victims of discrimination and that the EEOC's enforcement suits should not be considered representative actions subject to Rule 23.

> Although the EEOC can secure specific relief, such as hiring or reinstatement, constructive seniority, or damages for backpay or benefits denied, on behalf of discrimination victims, the agency is guided by 'the overriding public interest in equal employment opportunity asserted through direct Federal enforcement.' 118 Cong. Rec. 4941 (1972). When the EEOC acts, albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing employment discrimination.

General Telephone, 446 U.S. at 327, 100 S. Ct. at 1699. This Court premised its conclusion on the basis that Congress had allowed individuals to maintain a lawsuit even when the EEOC also was litigating its own action under Title VII. Similarly, under the ADEA, as the Petitioners have explained to the Court, individuals are allowed to file their own action prior to the filing of the EEOC's lawsuit and this action remains viable even after the EEOC's institution of litigation. The only reason that the Petitioners herein were not allowed to continue to prosecute their age discrimination claims under the ADEA is that the Supreme Court in *Kimel* determined that the states had not waived sovereign immunity under the Fair Labor Standards Act which is the jurisdictional underpinning of the ADEA. Nevertheless, their age discrimination claims under the Louisiana antidiscrimination statutes remained valid and as such, the U.S. District Court remanded these claims for the Petitioners for their handling in the Louisiana state court.

The Court further explained in *General Telephone*:

> We note finally that the adequate-representation requirement is typically construed to foreclose the class action where there is a conflict of interest between the named plaintiff and the members of the putative class. . . . But unlike the Rule 23 class representative, the EEOC is authorized to proceed in a unified action and to obtain the most satisfactory overall relief even though competing interests are involved and particular groups may appear

> to be disadvantaged. The individual victim is given his right to intervene for this very reason. The EEOC exists to advance the public interest in preventing and remedying employment discrimination, and it does so in part by making the hard choices where conflicts of interest exist. We are reluctant, absent clear congressional guidance, to subject § 706(f)(1) actions to requirements that might disable the enforcement agency from advancing the public interest in the manner and to the extent contemplated by the statute.

General Telephone, 446 U.S. at 331, 100 S. Ct. at 1704. However, as this Court explained, the petitioners in *General Telephone* were seeking to apply Rule 23 to the EEOC in order to acquire

> . . . a judgment in the EEOC's suit that will be binding upon all individuals with similar grievances in the class or subclasses that might be certified. We are sensitive to the importance of the res judicata aspects of Rule 23 judgments, but we are not free to depart from what we believe the statutory design to be.

General Telephone, 446 U.S. at 332, 100 S. Ct. at 1706.

C. The Federal EEOC Did Not Adequately Represent the Plaintiffs When the EEOC Voluntarily Dismissed Its Appeal in Their Federal Case and for This Reason, Res Judicata or Collateral Estoppel Cannot Act as a Bar to the Plaintiffs' State Lawsuit.

The U.S. District Court also provided a second justification for not finding privity between the Plaintiffs and the EEOC due to the lack of adequate representation by the EEOC when the EEOC dropped its appeal of the District Court's granting of summary judgment. As explained in the Magistrate Judge's Report and Recommendation, which the District Judge accepted, "Under *Gonzales v. Cassidy*, 474 F.2d 67 (5th Cir. 1973), so long as an appeal could not be characterized as patently meritless or frivolous, the failure to prosecute the appeal means that the representative in the prior suit did not vigorously and tenaciously protect the interests of the represented parties."

The Court must consider whether a representative performed inadequately in the handling of a case in order to assess whether that case can be used to bar a subsequent claim or presentation of an issue through res judicata or collateral estoppel. The U.S. Supreme Court in *Richards v. Jefferson County*, 517 U.S. 793, 800 (1996), explained that

> . . . a prior proceeding, to have binding effect on absent parties, would at least have to be 'so devised and applied as to insure that those present are of the same class as those absent and that the litigation is so conducted as to insure the full and fair consideration of the common issue.'

Richards, 517 U.S. at 800, citing *Hansberry v. Lee*, 311 U.S. at 43 and *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985). Considering federal due process, the Supreme Court determined that the first plaintiffs who had challenged the occupation tax did not sufficiently represent the current plaintiffs so as to allow the first adjudication to bar the second lawsuit.

The Fifth Circuit in *Gonzales v. Cassidy*, 474 F.2d 67 (5th Cir. 1973) refused to bar another lawsuit brought by someone who had been a member of the class represented in a class action lawsuit when it determined that the class representative had not adequately represented the interests of the class. The Fifth Circuit explained, "It is axiomatic that an appeal is a significant element in the judicial process. Gaytan's failure to prosecute an appeal deprived the members of his class, whose rights were not vindicated by the three-judge court's decision, of full participation in this process." *Gonzales*, 474 F.2d at 76. The Fifth Circuit similarly refused to apply res judicata in *Kline v. Rankin*, 489 F.2d 387 (5th Cir. 1974). In *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157 (5th Cir. 1978), the Fifth Circuit also concluded that because the appeal was not patently meritless or frivolous, the district court should have allowed it to go forward with substitute counsel. The Second Circuit in *Stephenson v. Dow Chemical Co.*, 273 F.3d 249 (2d Cir. 2001) found that res judicata could not bar the later lawsuit

because the current plaintiffs had not been sufficiently represented in the prior class action by the class plaintiffs. Citing *Gonzales*, 474 F.2d at 74, the Court explained that res judicata could not apply when its use would violate due process and that due process included adequate representation at all times throughout the litigation.

II. Certiorari Should Be Granted To Remedy The Fifth's Circuit's Departure From This Court's Established Ruling In *Anderson v. City Of Bessemer City, N.C.*

The Fifth Circuit in its opinion states, "The application of the relitigation exception to the Anti-Injunction Act, however, is a question of law and therefore we review the District court's denial of ULM's motion for permanent injunction *de novo*." Citing *Southwest Airlines Co. v. Tex. Int'l Airlines*, 546 F.2d 84, 95 (5th Cir. 1977), the Fifth Circuit states, "Privity is a 'legal conclusion that the relationship between the one who is a party on the record and the non-party is sufficiently close to afford application of the principle of preclusion." Reviewing the question of privity *de novo*, the Court determines, "We conclude that the EEOC did represent Vines and McGraw for res judicata and collateral estoppel purposes in the federal case brought against ULM." (Pet. App. at 9a). However, the panel misapprehended the standard of review for the findings of fact underpinning the privity issue. The factual findings leading to a determination of privity do not receive *de novo* review, but rather are to be evaluated only for clear error, as declared by the Fifth Circuit previously in *Astron Industrial Associates, Inc. v. Chrysler Motors Corp.*, 405 F.2d 958 (5th Cir. 1968). Similarly, in *Concerned Women for America v. Lafayette County*, 883 F.2d 32 (5th Cir. 1989), the Court reiterated that the district court's findings of fact must be upheld unless they are clearly erroneous, even though the conclusions of law pertinent to the issuance of an injunction are subject to independent review. The Fifth Circuit in *Astron* concluded, "This determination of identity between litigants for the purpose of establishing privity is a factual question, and the District Court should not be reversed unless its determination is clearly erroneous." *Astron*, 405 F.2d at 961.

Under Fed. R. Civ. P. 52(a), findings of fact are not to be set aside unless clearly erroneous. Only if the reviewing court "is left with the definite and firm conviction that a mistake has been committed" can the finding of fact be said to be clearly erroneous. *Justiss Oil Co. v. Kerr-McGee Refining Corp.*, 75 F.3d 1057, 1062 (5th Cir. 1996), citing *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S. Ct. 525, 542, 92 L. Ed. 746 (1948). Further, the Fifth Circuit in *Justiss Oil* explained that even if the reviewing court disagrees with the factual finding of the trier of fact, this is insufficient to reverse the factual finding:

> This standard precludes a reviewing court from reversing a finding of the trier of fact simply because it is convinced that it would have decided the case differently. *Anderson v. City of Bessemer City*, 470 U.S. 564, 573, 105 S. Ct. 1504, 1511, 84 L. Ed. 2d 518 (1985). In fact, '[i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous. *Id.* at 573-74, 105 S. Ct. at 1511.

Justiss Oil, 75 F.3d at 1062. *See also Sockwell v. Phelps*, 20 F.3d 187, 190 (5th Cir. 1994) and *Branch-Hines v. Hebert*, 939 F.2d 1311, 1320-21 (5th Cir. 1991).

This Court in *Anderson* cautioned:

> The reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court. 'In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*.

Anderson, 470 U.S. at 573, 105 S. Ct. at 1511. The clearly erroneous standard is applied to all findings of fact, even those that

are not based on credibility assessments, but rather on physical or documentary evidence or inferences from other facts. *Anderson*, 470 U.S. at 573, 574, 105 S. Ct. at 1511-12.

Despite the Fifth Circuit's prior decisions in *Astron* and *Concerned Women*, the decision of the Court herein concerning the issue of privity incorrectly was predicated upon a *de novo* review of the factual circumstances surrounding the EEOC in the initial lawsuit and Petitioners. The Fifth Circuit did not pay appropriate deference to the factual findings by the U.S. District Court. Rather, the Court engaged in a *de novo* review of the findings of fact attendant to the issue of privity. First, the Court concludes from the language of the ADEA, in particular, 29 U.S.C. § 626(c)(1), that the EEOC is not always to be considered the representative of the individuals on whose behalf it sues:

> For example, the EEOC's role differs when it seeks to enjoin discrimination against an plaintiff. In a situation where there is a clear divergence of interests between the entire class or attempts to protect a broader interest than simply that of the individual EEOC and the aggrieved individual, we must determine in each case whether privity exists. This is not the situation in the present case and we express no view regarding the question of whether the doctrine of representative claim preclusion would apply in such a case.

(Pet. App. at 10a).

The determination as to whether there is a "clear divergence of interests between the EEOC and the aggrieved individual" is a question of fact, not a question of law. Whether such divergence of interests is an element to be considered in the issue of privity is a legal question postulated by the Fifth Circuit, but the determination as to whether and to what degree such divergence exists is a factual finding for the District Court and it is to be evaluated for clear error only. However, the Fifth Circuit conducted its own *de novo* review and decided, "In the present case, it is clear that the EEOC's interest did not diverge from that of Vines and McGraw." (Pet. App. at 11a).

The Report and Recommendation adopted by the U.S. District Court lists several findings of fact leading to its conclusion that there was no privity between the EEOC and the Plaintiffs. The District Court noted that under *Kimel*, only the EEOC could prosecute an ADEA claim and that the EEOC could not prosecute any state law antidiscrimination claims of the Petitioners, which were reserved under *Kimel*. With respect to the expansion of the EEOC lawsuit to a class action, significantly, the U.S. District Court determined as a finding of fact, "The EEOC action was not prosecuted solely regarding the plaintiffs, and the commission was, in effect, representing the general public interest rather than those of the plaintiffs." (Pet. App. at 28a). The U.S. District Court adopted this finding of fact from the opinion of the Louisiana Second Circuit Court of Appeals, but it is notable that the U.S. District Court selected this particular section of the opinion as a finding of fact because the U.S. District Court was in the best position to assess the conduct of the litigation by the EEOC. In so evaluating the manner in which the EEOC handled the litigation, the U.S. District Court essentially determined that the EEOC represented the public interest more so than that of the Plaintiffs. The U.S. District Court concluded this from its observation of the EEOC's entire management of the case which included how the EEOC developed its theories of the case in its Motion for Summary Judgment and its opposition to the Defendants' Motion for Summary Judgment, including the EEOC advancing a disparate impact theory, and the nature of the discovery undertaken by the EEOC. The District Court also excerpted the finding of fact that Petitioners lacked control over the EEOC's conduct of the ADEA litigation, including the EEOC's dismissal of the appeal. All of these findings of fact underpinned the U.S. District Court's conclusion that there was a divergence of interests between the EEOC and Petitioners . The District Court then made the legal conclusion that there was no privity between the EEOC and the Plaintiffs.

The District Court's findings of fact concerning privity are supported by evidence in the record. Even if the Fifth Circuit disagrees with the factual findings, it cannot set them aside unless

the findings are clearly erroneous. The District Court was well acquainted with the manner in which the EEOC conducted the litigation and the remand of the Petitioners' state claims to the Louisiana state court. The findings of the District Court concerning privity were grounded in the factual findings that the Louisiana Second Circuit Court of Appeals made. The District Court found that the EEOC lacked any standing to prosecute the Petitioners' state law antidiscrimination claims that it had specifically reserved to the Petitioners on a remand. The District Court also determined that the EEOC had expanded the class of victims beyond the Petitioners, and that as a finding of fact, the EEOC represented the general public interest and not the Petitioners, citing *EEOC v. United States Steel Corp.*, 921 F.2d 489 (3d Cir. 1990). The District Court also found that the Petitioners had not been given a full and fair opportunity to prosecute their state law claims. The District Court's finding of fact that there was a divergence of interests between the EEOC and the Petitioners is plausible in light of the entire record and in so choosing between two permissible views, the District Court's factual finding is not clearly erroneous. While this Court reviews the legal conclusion regarding privity *de novo*, it must accept the factual findings of the District Court because they are not clearly erroneous. These factual findings by the District Court are then utilized for an evaluation of the legal question of privity. These factual findings justify the District Court's decision to deny the Respondents an injunction under the relitigation exception to the Anti-Injunction Act.

CONCLUSION

The circuit court's opinion incorrectly determines the EEOC to be in privity with Petitioners so as to allow the imposition of an injunction against Petitioners' state lawsuit which was filed prior to the EEOC's action. No other circuit court has found the EEOC to be the representative of individuals with respect to their state discrimination claims and such a determination is in contravention of § 626(c)(1) of the ADEA. Without establishing that the district court's findings were clearly erroneous, the Fifth Circuit relies upon findings of fact that it supplanted for those of the District Court in order to reach its conclusion that privity existed between the EEOC and Petitioners. This *de novo* fact-finding by the Fifth Circuit deviates from Fed. R. Civ. P. 52 and this Court's decision in *Anderson*. In so doing, Petitioners are being deprived of their right to their day in court.

This Court should grant Dr. Vines and Dr. McGraw's writ of certiorari to obviate the direct conflict with the ADEA's reservation of private suit rights and the Second, Ninth and Eleventh Circuit's rulings in comparable cases where the Second, Ninth and Eleventh Circuits refused to use a final decision involving the EEOC to bar the private state litigation. Granting Petitioners' writ of certiorari also will reinforce this Court's approach in *Anderson* to the review of findings of fact under the clearly erroneous standard as defined in Fed. R. Civ. P. 52. It is critical for the circuit courts, and specifically, the Fifth Circuit below, to comprehend the limits of their review of factual findings by the district courts and to pay proper deference to findings of fact that are not clearly erroneous.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED JANUARY 28, 2005

UNITED STATES COURT OF APPEALS FIFTH CIRCUIT

No. 03-31172

DWIGHT VINES; VAN MCGRAW,

Plaintiffs-Appellees,

v.

UNIVERSITY OF LOUISIANA AT MONROE; BOARD OF SUPERVISORS OF THE UNIVERSITY OF LOUISIANA SYSTEM,

Defendants-Appellants.

Appeal from the United States District Court for the Western District of Louisiana

Before KING, Chief Judge, and SMITH and GARZA, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:

The University of Louisiana at Monroe[1] and the Board of Trustees, University of Louisiana System (hereinafter

1. Northeast Louisiana University changed its name to the University of Louisiana at Monroe in 1999.

collectively "ULM") appeal the district court's denial of their motion for permanent injunction under the "relitigation exception" to the Anti-Injunction Act claiming that the doctrines of res judicata and collateral estoppel preclude Dwight Vines' and Van McGraw's age discrimination suit filed in state court. We find that all of the elements of ULM's collateral estoppel claim have been satisfied and that the instant case falls within the relitigation exception to the Anti-Injunction Act. We therefore REVERSE and REMAND to the district court to enter an injunction preventing Vines and McGraw from proceeding with their state age discrimination claims against ULM.

I

Vines and McGraw are former administrators and faculty members of ULM. After serving a sufficient number of years to qualify for retirement benefits under the Teachers' Retirement System of Louisiana ("TRSL"), Vines voluntarily elected to retire in 1991 and McGraw elected to retire in 1989. Pursuant to the TRSL, they each received retirement benefits for life and one-hundred percent of their average compensation during their previous three years. Vines and McGraw were simultaneously rehired on a year-to-year basis and each worked for five years, receiving retirement benefits in addition to a salary for work performed. In January 1996, the University of Louisiana System adopted a policy prohibiting the re-employment of retirees on a regular full-time basis and Vines and McGraw were notified that they would not be rehired for the 1996- 97 academic year.

Appendix A

Vines and McGraw filed identical suits in federal and state court, claiming ULM violated the federal Age Discrimination in Employment Act ("ADEA") (29 U.S.C. § 621 (2004) *et. seq.*) and Louisiana Employment Discrimination Law ("LAEDL") (LA. REV. STAT. ANN. § 23:301 (2004) *et seq.*) by prohibiting re-employment of retirees, paying the plaintiffs less than younger professors, and increasing their workloads. ULM removed the state court suit under federal question jurisdiction and the cases were consolidated. The Equal Employment Opportunity Commission ("EEOC") then instituted a separate action in federal court, naming Vines and McGraw as aggrieved parties, alleging violations of the ADEA by ULM. The EEOC action was also consolidated with Vines' and McGraw's cases.

ULM filed a motion for summary judgment seeking dismissal of all the remaining ADEA claims based upon *Kimel v. Florida Board of Regents,* 528 U.S. 62 (2000). The district court concluded that it lacked jurisdiction over Vines' and McGraw's ADEA claims, but that the EEOC was not barred from asserting those claims on their behalf. Vines' and McGraw's state law claims were remanded to state court. The district court then granted ULM's motion for summary judgment dismissing the EEOC lawsuit, finding that ULM's policy did not violate the ADEA. The EEOC sought to appeal the judgment, but then voluntarily dismissed the appeal.

ULM filed a peremptory exception of res judicata/ collateral estoppel in the present case in state court, arguing that Vines and McGraw asserted the same claims and issues previously litigated and decided adversely to them in federal

court. The Louisiana trial court granted the exception, dismissing the state claims with prejudice after finding that the federal principles of res judicata applied to bar the suit. The court noted that the federal court decision was rendered by a court of competent jurisdiction, the decision was final and on the merits, the EEOC and the plaintiffs were in privity, and the causes of action arose from the same nucleus of operative facts. The Second Circuit Court of Appeal in Louisiana reversed the trial court judgment, which had granted an exception of res judicata in favor of ULM, and reinstated the state court action, concluding that privity did not exist between Vines and McGraw and the EEOC. *Vines v. Northeast La. Univ.,* 839 So.2d 979, 987 (La.App. 2 Cir. 3/5/03). ULM's request for *en banc* rehearing in the Second Circuit and their application for writ to the Louisiana Supreme Court were denied. *Vines v. Northeast La. Univ.,* 853 So.2d 638, 638 (La.9/19/03).

ULM filed a motion under the "relitigation exception" of the Anti-Injunction Act with the Western District of Louisiana seeking to enjoin Vines and McGraw's lawsuit in state court based on the federal court's decision in favor of ULM against the EEOC. The district court denied the permanent injunction and ULM appealed to this court.

II

We generally review a district court's denial of a motion for a permanent injunction for abuse of discretion. *See St. Paul Mercury Ins. Co. v. Williamson,* 332 F.3d 304, 308 (5th Cir.2003). The application of the relitigation exception to the Anti-Injunction Act, however, is a question

of law and therefore we review the district court's denial of ULM's motion for a permanent injunction *de novo*. *Id.*

The Anti-Injunction Act generally prohibits federal courts from interfering with proceedings in state court. 28 U.S.C. § 2283 (2004). There are only three specific circumstances in which a federal court can enjoin a state court proceeding, when it is: (1) expressly authorized by a federal statute; (2) necessary to assert jurisdiction; or (3) necessary to protect or effectuate a prior judgment by a federal court. *Id.; St. Paul Mercury Ins. Co.*, 332 F.3d at 308-09. The third exception is referred to as the "relitigation" exception. "The relitigation exception was designed to permit a federal court to prevent state litigation of an issue that previously was presented to and decided by the federal court. It is founded in the well-recognized concepts of res judicata and collateral estoppel." *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 147 (1988).

There are two related doctrines of preclusion: (1) claim preclusion, commonly referred to as res judicata, and (2) issue preclusion, known as collateral estoppel. *See Montana v. United States*, 440 U.S. 147, 153 (1979). In order to determine if the relitigation exception to the Anti-Injunction Act is applicable to preclude litigation of a claim in state court under the doctrine of res judicata, this court applies a four-part test. "First, the parties in a later action must be identical to (or at least in privity with) the parties in a prior action. Second, the judgment in the prior action must have been rendered by a court of competent jurisdiction. Third, the prior action must have concluded with a final judgment on the merits. Fourth, the same claim or cause of action must be involved in both

suits." *N.Y. Life Ins. Co. v. Gillispie,* 203 F.3d 384, 387 (5th Cir.2000) (quoting *United States v. Shanbaum,* 10 F.3d 305, 310 (5th Cir.1994)). The doctrine of collateral estoppel applies to prevent issues of ultimate fact from being relitigated between the same parties in a future lawsuit if those issues have once been determined by a valid and final judgment. *Ashe v. Swenson,* 397 U.S. 436, 443 (1970); RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982) ("When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between parties, whether on the same or a different claim.") (*cited in Grogan v. Garner,* 498 U.S. 279, 284 (1991)). While complete identity of all parties is not required, the party against whom the collateral estoppel would be applied generally must either have been a party, or privy to a party, in the prior litigation. *See Terrell v. DeConna.,* 877 F.2d 1267, 1270 (5th Cir.1989).

Vines and McGraw concede that there was a judgment by a court of competent jurisdiction in the ADEA claim brought by the EEOC and that it was a final judgment on the merits.

III

The issue this court must decide initially is whether, even if the state court mistakenly rejected ULM's res judicata claim, a federal court injunction is permitted against enforcement of the state court judgment. The Supreme Court has stated that "[o]nce the state court has *finally* rejected a claim of res judicata, then the Full Faith and Credit Act

becomes applicable and federal courts must turn to state law to determine the preclusive effect of the state court's decision." *Parsons Steel, Inc. v. First Ala. Bank,* 474 U.S. 518, 524 (1986) (emphasis added). The Full Faith and Credit Act requires federal courts as well as state courts to give state judicial proceedings "the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken." 28 U.S.C. § 1738 (2004).

This court must determine whether the Louisiana state court decision, that the prior federal adjudication of the EEOC's claims does not bar the state court proceedings, would be given preclusive effect under Louisiana law and therefore be entitled to full faith and credit. *See Migra v. Warren City Sch. Dist. Bd. of Educ.,* 465 U.S. 75, 81 (1984). Under Louisiana law, in order for a judgment to be entitled to preclusive effect it must be a final judgment. LA. REV. STAT. ANN. § 13:4231 (2004). Louisiana law distinguishes between interlocutory judgments and final judgments. "A judgment that does not determine the merits but only preliminary matters in the course of an action is an interlocutory judgment." LA.CODE CIV. PROC. ANN. art. 1841 (2004). On the other hand, "[a] judgment that determines the merits in whole or in part is a final judgment." *Id.*

The state trial court in this case granted ULM's peremptory exception of res judicata, but the Louisiana Second Circuit Court of Appeal overruled the trial court's decision and remanded the case for a trial on the merits. Under Louisiana law, the overruling of a peremptory

exception is an interlocutory judgment and thus not entitled to preclusive effect. *See Marsh Eng'g, Inc. v. Parker,* 680 So.2d 637, 638 (La.09/27/96); *Bellard v. Biddle,* 834 So.2d 1238, 1241 (La.App. 3 Cir. 12/30/02). The Louisiana Supreme Court's denial of ULM's writ also did not decide the merits of the res judicata issue, but only allowed the interlocutory ruling to stand pending further review at a later stage of the proceeding. *Id.* Therefore, because the state courts' rulings on the res judicata issue were interlocutory and not final, a federal court may enjoin Vines and McGraw from relitigating, through a state court action, issues already decided against them in federal court.

IV

The district court concluded that Vines and McGraw could proceed with their Louisiana age discrimination suit, holding that they were not bound by the federal court decision because they were not a party in that suit nor was there privity between the EEOC and the individual plaintiffs. The district court adopted the magistrate judge's report and recommendation which accepted the ruling of the Louisiana Second Circuit Court of Appeals. *Vines,* 839 So.2d 979. The Louisiana court reasoned that because Vines and McGraw were denied an opportunity to assert their state claims in federal court, they maintained the right to sue under the state statutory scheme since the EEOC had no standing to prosecute such claims under Louisiana law. *Id.* at 987. The opinion also noted that the EEOC action was not prosecuted solely for the individual benefits of Vines and McGraw, but rather for the general public interest. *Id.* Finally, the state

court held that Vines and McGraw had no control over the conduct of the suit prosecuted by the EEOC. *Id.*

Whether the district court may file an injunction under the Anti-Injunction Act hinges on whether the EEOC was in privity with Vines and McGraw. Privity is a "legal conclusion that the relationship between the one who is a party on the record and the non-party is sufficiently close to afford application of the principle of preclusion." *Southwest Airlines Co. v. Tex. Int'l Airlines,* 546 F.2d 84, 95 (5th Cir.1977). Federal courts have consistently held that a non-party to an action is still bound by and entitled to the benefits of a judgment as though it were a party if it was represented in the original action. *See Meza v. Gen. Battery Corp.,* 908 F.2d 1262, 1266-67 (5th Cir.1990). It is well-settled precedent that a judgment in an action in which a government agency represents private individuals is binding on those individuals. *See Heckman v. United States,* 224 U.S. 413, 445-46 (1912). The EEOC is an agency expressly invested by law with the authority to represent the interests of individuals in civil actions against employers to recover damages for discriminatory practices. 42 U.S.C. § 2000e-5 (2004). We conclude that the EEOC did represent Vines and McGraw for res judicata and collateral estoppel purposes in the federal case brought against ULM.

In *Jones v. Bell Helicopter Co.*, this court considered the issue of "whether an individual may bring a private Title VII action, based on the same claim at issue in an earlier action brought by the [EEOC], when the Commission's action is set aside for failure to comply with the Administrative

Procedure Act."[2] 614 F.2d 1389, 1389 (5th Cir.1980). This court held that despite the EEOC's "ineptitude, sloth, and indifference" in failing to promptly pursue legal action on his behalf, res judicata barred the individual from pursuing the same claim because privity existed between him and the EEOC. *Id.* at 1391. This decision, however, preceded the Supreme Court's decision in *General Telephone. Co. of the Northwest, Inc. v. EEOC* which discussed how the interests of the EEOC and of the individual may be divergent. 446 U.S. 318, 326 (1980); *see also Riddle v. Cerro Wire and Cable Group, Inc.,* 902 F.2d 918, 923 (11th Cir.1990). Also, unlike *Jones*, this is an ADEA claim and not a Title VII case. The distinctive enforcement scheme of the ADEA terminates the right of an individual to pursue an action once the EEOC commences an action to enforce the employee's rights under the statute, whereas the enforcement scheme of Title VII does not terminate the rights of the employee once the EEOC brings a suit. 29 U.S.C. 626(c)(1) ("the right of any person to bring such action shall terminate upon the commencement of an action by the [EEOC] to enforce the right of such employee under [the ADEA]"). Therefore, the EEOC is not *always* to be considered the representative of individuals on whose behalf it brings an ADEA action. For example, the EEOC's role differs when it seeks to enjoin discrimination against an entire class or attempts to protect a broader interest than simply that of the individual plaintiff. In a situation where there is a clear divergence of interests between the EEOC and the aggrieved individual, we must determine in

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2. The district court found that the EEOC had delayed its determination of cause and the issuance of the conciliation letters for 5-7 years in violation of the Administrative Procedure Act.

each case whether privity exists. This is not the situation in the present case and we express no view regarding the question of whether the doctrine of representative claim preclusion would apply in such a case.

In the present case, it is clear that the EEOC's interest did not diverge from that of Vines and McGraw. When the EEOC seeks private benefits for individuals under the ADEA, it takes on representative responsibilities that places it in privity with those individuals. Although this court has not addressed this specific issue, several other circuits have reached this conclusion. The Third Circuit held that the "ADEA's distinctive enforcement scheme gives the EEOC representative responsibilities when it seeks private benefits for an individual and that the doctrine of representative claim preclusion must therefore be applied." *EEOC v. U.S. Steel Corp.*, 921 F.2d 489, 495 (3d Cir.1990). In *U.S. Steel Corp.* the EEOC filed a complaint alleging that the United States Steel Corporation had violated the ADEA because employees were required to sign waivers as a condition for obtaining more favorable retirement benefits. Several employees had been unsuccessful with their individual suits on the same claim. The district court granted relief in the EEOC's case, including a permanent injunction against requiring the release. The district court also determined that the earlier judgments against the individuals did not preclude retroactive relief. The Third Circuit focused on the "distinctive scheme" of the ADEA in reversing the district court, reasoning that the ADEA intended for the EEOC to act as the representative for individual employees when it sought to recover individual benefits for them, which is demonstrated by the fact that the individual's right to sue is cut off once the EEOC begins an

action. *Id.;* 29 U.S.C. § 626(c)(1). The court viewed "the provision of the ADEA prohibiting private suits once the EEOC files its complaint as essentially a codification of the doctrine of representative claim preclusion with respect to those instances in which the EEOC litigates first: litigation by the representative party (the EEOC) seeking private relief for an individual precludes subsequent litigation of the same claim by an individual for whom the representative sought relief." *U.S. Steel Corp.*, 921 F.2d at 495.

Several other courts have followed the reasoning of the Third Circuit in *U.S. Steel Corp.*, recognizing that the ADEA places the EEOC in privity with individuals for whom it seeks relief such that a lawsuit litigated by either the EEOC or the individual bars subsequent relitigation of the same claims or issues. The Seventh Circuit held that the EEOC was barred from recovering back pay or liquidated damages on behalf of an individual who had previously litigated the same claim without success, stating that they "agree [d], generally, with the Third Circuit's position that there is privity between the EEOC and individuals for whom it seeks individual benefits." *EEOC v. Harris Chernin, Inc.*, 10 F.3d 1286, 1291 (7th Cir.1993). The Second Circuit also concluded that the statutory enforcement mechanism of the ADEA "gives the EEOC representative responsibilities when it seeks private benefits for an individual." *EEOC v. Kidder, Peabody & Co.*, 156 F.3d 298, 302 (2nd Cir.1998) (quoting *U.S. Steel Corp.*, 921 F.2d at 495), *overruled on other grounds, EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002). Several district courts have also considered the issue and have reached the same conclusion. *See EEOC v. TIC-The Indus. Co., et al.*, No. 01-1776, 2002 U.S. Dist. LEXIS 22728, at *8 (E.D.La. Nov.

21, 2002) ("the conclusion that the EEOC is the individual's representative in ADEA suits . . . seems inescapable."); *Mohammed v. May Dep't Stores,* 273 F.Supp.2d 531, 535 (D.Del.2003); *EEOC v. Luce, Forward, Hamilton & Scripps,* 122 F.Supp.2d 1080, 1087-88 (C.D.Cal.2000); *EEOC v. Nebco Evans Distrib. Inc.,* No. 8:CV96-00644, 1997 U.S. Dist. LEXIS 23111, at *11-12 (D.Neb. June 9, 1997).

The Second Circuit Court of Appeal in Louisiana relied almost entirely on the California state appellate court's decision in *Victa v. Merle Norman Cosmetics, Inc.* in holding that privity did not exist between the EEOC and Vines and McGraw. 19 Cal.App.4th 454 (1993). In *Victa,* the state court determined that an action in federal court brought by the EEOC under the ADEA claiming age discrimination did not serve as a res judicata bar to the individual plaintiff's state law age discrimination suit in state court. The individual plaintiff proceeded with her state court claim after the EEOC and the defendant in the federal suit agreed upon a stipulated judgment that included only injunctive relief. The court noted that "[a]lthough the complaint stated that the EEOC was bringing the case both to correct unlawful employment practices [of the defendant] and to make plaintiff whole, by the time it agreed to the judgment the EEOC had dispensed with plaintiff's particular interest, and was content to dismiss the case in exchange for [defendant's] submission to a general injunction. Surely, in obtaining the judgment here urged as res judicata the EEOC did not act as plaintiff's representative." *Id.* at 468.

The EEOC plays a dual role under the enforcement scheme of the ADEA, both protecting the public interest and vindicating specific private claims by seeking individual relief on their behalf. *See Gen. Tel. Co. of the Northwest,* 446 U.S. at 331; *U.S. Steel Corp.,* 921 F.2d at 496. The responsibilities of each of these roles, however, does not necessarily conflict. Unlike in *Victa*, the EEOC in this case never abandoned the interests of the individual plaintiffs. The EEOC acted as Vines' and McGraw's representative in seeking monetary, "make-whole" relief in the federal case, the same relief they now seek in their state court action.[3]

The district court and the Louisiana Second Circuit reasoned that by expanding the class of victims in the suit to include others similarly situated with the plaintiffs, the EEOC was no longer prosecuting the action solely for Vines and McGraw, but in effect representing the general public. Therefore, the court concluded that privity did not exist because the EEOC sought to enjoin discrimination against a class of victims, not just the plaintiffs. The Louisiana court, however, failed to explain how any conflict of interest was created by the EEOC expanding the class of victims or by also seeking injunctive relief. Unlike in *Victa*, the EEOC did not seek as its sole relief a general injunction. The EEOC continued to pursue monetary, "make-whole" relief for Vines and McGraw, in addition to an injunction against ULM's practices.

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3. In its complaint, the EEOC sought "make-whole" relief for Vines and McGraw, including "backpay, frontpay, with prejudgment interest, . . . with general compensatory damages." R. Vol. 15 at p. 7.

The district court's contention that the absence of control by Vines and McGraw over the conduct of the suit by the EEOC prevented the suit from operating as a bar to their state court claims must also be rejected. "The absence of any formal designation of the individual claimants as parties . . . does not change the nature of the EEOC's role as the individuals' representative and should not change the effect of the doctrine of claim preclusion. By claiming or accepting individual relief won by the EEOC, the individual would necessarily concede that the EEOC was their representative and that they were embraced by the EEOC's judgment." *U.S. Steel Corp.*, 921 F.2d at 496. Vines and McGraw were named in the EEOC suit and there is no question that had the EEOC won its claim against ULM that they would have accepted the individual relief. Therefore, even if it is conceded that Vines and McGraw did not have any control over the federal suit, it does not affect the preclusive effects of the decision on their current state suit.

Vines and McGraw attempt to distinguish this case from the decisions in *U.S. Steel Corp.* and the other courts which have considered the issue by arguing that the sequence in which the duplicative lawsuits are filed or resolved determines whether privity applies. The doctrine of representative claim preclusion, however, applies equally regardless of the order of litigation. *U.S. Steel Corp.*, 921 F.2d at 493.

Appendix A

V

Res judicata requires that the same claim or cause of action be involved in both proceedings and the doctrine of collateral estoppel requires that the same issue of fact or law be actually litigated and determined in a prior judgment. *N.Y. Life Ins. Co.,* 203 F.3d at 387; *Ashe,* 397 U.S. at 443. Federal law of res judicata "bars all claims that were or could have been advanced in support of the causes of action on the occasion of its former adjudication, not merely those that were adjudicated." *Nilsen v. City of Moss Point,* 701 F.2d 556, 560 (5th Cir.1983) (emphasis omitted). Federal courts "use a transactional test to determine whether two claims involve the same cause of action, under which the critical question is 'not the relief requested or the theory asserted but whether the plaintiff bases the two actions on the same nucleus of operative facts.'" *N.Y. Life Ins. Co.,* 203 F.3d at 387 (quoting *Agrilectric Power Partners v. Gen. Elec. Co.,* 20 F.3d 663, 665 (5th Cir.1994)). "Collateral estoppel does not preclude litigation of an issue unless both the facts and the legal standard used to assess them are the same in both proceedings." *Copeland v. Merrill Lynch & Co., Inc.,* 47 F.3d 1415, 1422 (5th Cir.1995).

The state claims brought by Vines and McGraw and the federal suit brought by the EEOC are both age discrimination suits.[4] Each complaint alleged that ULM maintained a policy

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4. The EEOC complaint stated: "The Board's policy openly discriminates against employees on the basis of age." Vines and McGraw's complaint stated: "The Defendant Board discriminated against the plaintiffs' on the basis of their age . . ."

of paying state retirees lower wages and assigned them greater workloads than those who were not state retirees.[5] The state claim was brought under the Louisiana Employment Discrimination Law ("LAEDL")[6] and the federal suit was brought under the ADEA. The two statutes are substantively similar and federal and state courts routinely follow cases interpreting the ADEA when evaluating claims brought under the LAEDL, recognizing the same burden of proof and defenses. *See Hypes v. First Commerce Corp.,* 134 F.3d 721, 726 (5th Cir.1998); *Deloach v. Delchamps, Inc.,* 897 F.2d 815, 818 (5th Cir.1990); *Montgomery v. Lobman, Carnahan, Batt & Angelle,* 729 So.2d 1075, 1077 (La.App. 4 Cir.1999).

Both the federal suit brought by the EEOC and the state court suit brought by Vines and McGraw involve claims that arise out of precisely the same set of facts[7], raise the same

5. The EEOC complaint stated: "The University admittedly paid Vines and McGraw less than non-retirees because of their retired status. The University assigned heavier workloads to retired non-tenure-track professors than to non-retired (younger) non-tenure track professors." Vines and McGraw's complaint similarly alleged: "During their tenure with [ULM] following their retirement through the TRSL, the Defendant [ULM] assigned them additional courses to teach than younger professors and paid them less salary than their younger counterparts. [ULM] violated the ADEA and [LAEDL] with these practices."

6. Vines and McGraw filed their lawsuits under LA. REV. STAT. ANN §§ 23:971 *et seq.* and 51:2232 *et seq.* After the filing of their lawsuits, the Louisiana Legislature amended the statutes and combined the antidiscrimination laws into one statute, LA. REV. STAT. ANN. § 23:301 *et seq.*, entitled the Louisiana Employment Discrimination Law.

7. The facts at issue in each suit, discussed *supra,* are not disputed by either party.

issues (including whether ULM discriminated against the individual plaintiffs in their pay, workloads and non-renewal of their contracts because of age), and seek monetary relief for Vines and McGraw.[8] The language in the complaints demonstrates the similarity between the two suits. The district court judge in the federal suit recognized that the claims involved the same facts and issues and consolidated Vines' and McGraw's state claims with the EEOC action.[9]

The district court ultimately held that ULM had "legitimate nondiscriminatory reasons for paying lower salaries to and not renewing the contracts of Vines and McGraw" and that the "EEOC ha[d] not produced sufficient evidence to show that the reasons were pretext for age discrimination." Collateral estoppel applies to preclude Vines and McGraw from relitigating these issues in their state court age discrimination action because they involve the same

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8. The EEOC's complaint requested as relief that the court: "make whole [Vines and McGraw] . . . by providing appropriate backpay with prejudgment interest, in amounts to be determined at trial, and other affirmative relief necessary to eradicate the effects of [ULM's] unlawful employment practices. Order [ULM] to make whole [Vines and McGraw] . . . by paying liquidated damages in an amount equal to back wages, plus prejudgment interest . . ." Vines and McGraw's complaint requested as relief: "general compensatory damages for pain and suffering and mental anguish and distress, for liquidated damages pursuant to the ADEA, for attorney's fees and costs in this action, and for all general and equitable relief."

9. The district court was forced to dismiss Vines' and McGraw's ADEA claims after the EEOC brought its action. It also remanded the state claims to state court.

issues of ultimate fact that have been determined by a valid and final prior judgment.[10]

VI

Vines and McGraw contend that, even if it is determined that the elements of res judicata or collateral estoppel are satisfied, they should not be precluded from proceeding with their state court claim. They argue that the EEOC failed to adequately represent them in the federal suit by voluntarily dismissing its appeal and that their state law claims were preserved when the federal court declined jurisdiction over the claims and remanded the state causes of action to the state court. We reject both arguments.

A

The district court in the federal case granted ULM's motion for summary judgment, dismissing the EEOC's case. Although the EEOC filed a Notice of Appeal, it withdrew its appeal. Vines and McGraw argue that the EEOC did not adequately represent them because the EEOC voluntarily dismissed its appeal in the federal case. As a result, they argue

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10. The state court suit, however, would not be barred by res judicata. The state court suit involves a claim under the LAEDL and the prior federal court decision adjudicated the EEOC's ADEA claim. Therefore, the same claim or cause of action is not being advanced in this suit as in the prior federal suit. *Nilsen,* 701 F.2d at 560. The EEOC also did not have standing to prosecute the state claims under Louisiana law and thus could not have brought the action that Vines and McGraw bring in the current suit. *Id.*

that res judicata and collateral estoppel cannot act as a bar to their state lawsuits.

Vines and McGraw assert that the proper test to determine adequate representation is whether the representative "vigorously and tenaciously protected the interests of the class" and so long as an appeal could not be characterized as patently meritless or frivolous, a representative must pursue an appeal or they will be considered to have provided inadequate representation.[11] This court, in *Gonzales v. Cassidy*, refused to bar a subsequent lawsuit by a member of a class represented in a class action lawsuit because the class representative had not adequately represented the interests of the class. 474 F.2d 67, 75-76 (5th Cir.1973). We held that the failure of the class representative to appeal from a judgment which granted him relief, while denying relief to other class members, rendered his representation of the class inadequate so as to preclude res judicata from attaching to that judgment. *Id.* at 75. The court noted that the class representative "vigorously represented the class until he obtained individual relief." *Id.* at 76.

Gonzales and the other cases cited by Vines and McGraw in support of their "adequacy" argument were class action cases in which the courts were required under Fed. R. Civ. P. 23 to determine whether the class representative adequately represented absent members of the class. The procedural rules of Rule 23, however, do not apply to EEOC representative

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11. The magistrate judge, in her report and recommendation, stated that even if there was privity between the EEOC and the individual plaintiffs, the EEOC failed to adequately represent their claims based on this reasoning.

actions under the ADEA. *Gen. Tel. Co. of the Northwest, Inc.*, 446 U.S. at 330.

The record establishes that the EEOC acted with due diligence and reasonable prudence. They conducted and participated in discovery, filed motions for summary judgment, and responded to motions filed by ULM. The EEOC did not inadequately represent Vines and McGraw simply because it made a calculated decision to voluntarily dismiss its appeal.[12]

B

Vines and McGraw argue that when a federal court declines jurisdiction over a state law claim in a federal lawsuit and remands the state cause of action to the state court that the state law claim is preserved and not subject to res judicata or collateral estoppel. In *King v. Provident Life and Accident Insurance Co.*, the plaintiff originally filed a lawsuit in state court for causes of action under ERISA as well as state claims pertaining to an inadequate opportunity to convert an insurance policy. 23 F.3d 926 (5th Cir.1994). The defendant removed the case to federal court where its motion for summary judgment was granted, dismissing all the claims except the state law claims. The district court judge specifically stated that "plaintiffs, of course, retain the right to file another lawsuit with regard to [the state law claims]."

12. THE RESTATEMENT (SECOND) OF JUDGMENTS states that "[a] person is not bound by a judgment for or against a party who purports to represent him if . . . The representative failed to prosecute or defend the action with due diligence and reasonable prudence . . ." § 42 (1982); *see also Mohammed,* 273 F.Supp.2d at 535.

Id. at 928. We held that the district court's language limited the preclusive effect of the dismissal of the federal claims, reasoning that a court has the ability to control the preclusive consequences of its rulings. *Id.* "Despite the general rule that a court cannot dictate preclusion consequences at the time of deciding a first action, it should have power to narrow the ordinary rules of claim preclusion. A judgment that expressly leaves open the opportunity to bring a second action on specified parts of the claim or cause of action that was advanced in the first action should be effective to forestall preclusion."[13] *Id.* (quoting 18 CHARLES A. WRIGHT ET. AL., FEDERAL PRACTICE & PROCEDURE § 4413 (1981)).

Unlike *King*, in which the district court specifically stated that plaintiffs retained the right to file another lawsuit, the district court judge made no such reservation of rights in either the remand order or the final judgment in this case. Absent an *express* reservation, res judicata applies to bar a second suit. Therefore, when two suits are pending based on the same claim or issue, the first final judgment rendered becomes conclusive in the other action. *Ellis v. Amex Life*

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13. THE RESTATEMENT (SECOND) OF JUDGMENTS § 26 (1982) (emphasis added) also states that:

> (1) When any of the following circumstances exists, the general rule of § 24 does not apply to extinguish the claim, and part or all of the claim subsists as a possible basis for a second action by the plaintiff against the defendant: . . .
>
> (b) The court in the first action has *expressly* reserved the plaintiff's right to maintain the second action . . .

Ins. Co., 211 F.3d 935, 937 (5th Cir.2000); *see also* LA. CODE CIV. PROC. ANN. art. 531 (1999).

VII

Because all of the elements of collateral estoppel have been satisfied, we find that this case falls within the boundaries of the relitigation exception to the Anti-Injunction Act. Accordingly, we REVERSE the judgment of the district court and REMAND the case for issuance of a permanent injunction enjoining Vines and McGraw from proceeding with their state court age discrimination suit against ULM.

APPENDIX B — JUDGMENT OF THE UNITED STATE DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA, MONROE DIVISION FILED NOVEMBER 10, 2003

IN THE UNITED STATE DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

CIVIL ACTION NO. 97-0873

JUDGE JAMES

MAGISTRATE JUDGE HAYES

DWIGHT VINES, ET AL

VERSUS

NORTHEAST LOUISIANA UNIVERSITY, ET AL

JUDGMENT

The Report and Recommendation of the Magistrate Judge having been considered, together with the written objections thereto filed with this Court, and, after a *de novo* review of the record, finding that the Magistrate Judge's Report and Recommendation is correct and that judgment as recommended therein is warranted,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the Defendants' motion for permanent injunction (Document No.285) is **DENIED**.

Appendix B

THUS DONE AND SIGNED this 10 day of November, 2003, in Monroe, Louisiana.

s/ Robert G. James

ROBERT G. JAMES
UNITED STATES DISTRICT JUDGE
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

JUDGMENT ENTERED
November 12, 2003

APPENDIX C — REPORT AND RECOMMENDATION ON MOTION FOR PERMANENT INJUNCTION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA, MONROE DIVISION FILED OCTOBER 3, 2003

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA MONROE DIVISION

CIVIL ACTION NO. 97-0873

JUDGE JAMES
MAGISTRATE JUDGE HAYES

DWIGHT VINES, ET AL

VERSUS

NORTHEAST LOUISIANA UNIVERSITY, ET AL

REPORT AND RECOMMENDATION ON MOTION FOR PERMANENT INJUNCTION

Before the undersigned Magistrate Judge, on reference from the District Court, is a motion for permanent injunction filed by the defendants. (Document No. 285). For reasons stated below, it is recommended that the motion be **DENIED**.

The underlying facts of this matter have been set out numerous times in the record of these proceedings, and they will not be restated herein.

Appendix C

Defendants moved for a permanent injunction of the individual plaintiffs' state court proceedings on the grounds that this court dismissed the EEOC's federal complaint on summary judgment, and that the summary judgment on the federal claims was res judicata as to the individual plaintiffs' state law claims. Prior to filing this motion, the defendants moved to dismiss the state court proceedings on the grounds of res judicata. The trial court granted that motion, but was reversed by the Second Circuit Court of Appeal. The defendants' application for writs to the Louisiana Supreme Court was denied.

A review of the ruling of the Louisiana Second Circuit shows that it is well-reasoned and persuasive. While recognizing that it had no precedential value in this state, the Second Circuit found persuasive and relied on the reasoning of *Victa v. Merle Norman Cosmetics*, 19 Cal.App. 4th 454, 24 Cal.Rptr.2d 17 (1993), in determining that there was no privity between the EEOC and the individual plaintiffs as follows:

> In this matter, after the Supreme Court decision in *Kimel*, the plaintiffs did not have the right to individually maintain an AREA claim against a state agency. After Kimel, only the EEOC could prosecute the ADEA claim against the defendants in this case. Because the plaintiffs' individual ADEA claim had to be dismissed on those grounds, the federal court no longer had jurisdiction over the state claim which had been asserted by the plaintiffs. The matter was remanded to the state court. However, the *Kimel*

decision specifically recognized the right of employees to sue under state statutory schemes. While the EEOC was the proper party to assert the ADEA claim, that agency did not prosecute any claim under state law. Further, as in *ficta*, there is no showing that the EEOC had standing to prosecute such a claim under Louisiana law.

Also, we note that the EEOC apparently expanded the class of victims in the suit to include others similarly situated with the plaintiffs. The EEOC action was not prosecuted solely regarding the plaintiffs, and the commission was, in effect, representing the general public interest rather than those of the plaintiffs. Therefore, even under the reasoning of *Equal Employment Opportunity Commission v United States Steel Corporation, supra*, it appears that the EEOC was not in privity with the plaintiffs because it sought to enjoin discrimination against a class of victims, not just the plaintiffs.

Further, the plaintiffs argue that they had no control over the conduct of the suit by the EEOC. They had no control over bringing or maintaining the ADEA action or in dismissing the appeal of the judgment against the EEOC.

Simply stated, the plaintiffs have a right to bring a suit under Louisiana's age discrimination statutes.

Appendix C

The plaintiffs have not been afforded a full and fair opportunity to litigate their claims under state law and those claims have not been adjudicated on the merits. At the time the suit was brought, the plaintiffs sought to assert their state claims as well as federal claims. The state claims were remanded by the federal court on grounds of lack of jurisdiction. Under *Reeder v. Succession of Palmer, supra,* the plaintiffs did not fail to assert pendent state law claims.

All four elements of the *res judicata* test must be satisfied. Because there was no privity between the plaintiffs and the EEOC, we find that the parties in the two actions were not the same.

Vines v. Northeast Louisiana University, 839 So.2d 979, 985-89 (La.App. 2d Cir. 3/5/03), *writ denied*, 2003-1262 (La. 9/19/03).

It is recommended that this court adopt the above reasoning and DENY the motion for permanent injunction on the basis of lack of privity between the state court plaintiffs and the EEOC.

The individual plaintiffs also argue that, even if there was privity between the EEOC and the individual plaintiffs, the EEOC failed to adequately represent their claims, pointing out that the EEOC voluntarily dismissed its appeal of this court's granting of summary judgment. Under *Gonzales v Cassidy*, 474 F.2d 67 (5th Cir. 1973), so long as an appeal could not be characterized as patently meritless or frivolous, the failure to prosecute the appeal means that the representative in the prior suit did not vigorously and tenaciously protect the interests of the represented parties.

Appendix C

Given the unsettled state of the law, the lack of clear precedent regarding disparate impact cases under the ADEA, and the report and recommendation from the undersigned finding that there were factual issues precluding summary judgment, the appeal in the federal case could not be characterized as patently meritless or frivolous. Thus, the defendants' motion for permanent injunction should be **DENIED** on this basis as well.

Under the provisions of 28 U.S.C. § 636(b)(1)(C) and F.R.C.P. Rule 72(b), the parties have ten (10) business days from service of this Report and Recommendation to file specific, written objections with the Clerk of Court. A party may respond to another party's objections within ten (10) business days after being served with a copy thereof. A courtesy copy of any objection or response or request for extension of time shall be furnished to the District Judge at the time of filing. Timely objections will be considered by the District Judge before he makes a final ruling.

A PARTY'S FAILURE TO FILE WRITTEN OBJECTIONS TO THE PROPOSED FINDINGS, CONCLUSIONS AND RECOMMENDATIONS CONTAINED IN THIS REPORT WITHIN TEN (10) BUSINESS DAYS FROM THE DATE OF ITS SERVICE SHALL BAR AN AGGRIEVED PARTY, EXCEPT ON GROUNDS OF PLAIN ERROR, FROM ATTACKING ON APPEAL THE UNOBJECTED-TO PROPOSED FACTUAL FINDINGS AND LEGAL CONCLUSIONS ACCEPTED BY THE DISTRICT JUDGE.

Appendix C

THUS DONE AND SIGNED at Monroe, Louisiana, this 3rd day of October, 2003.

s/ Karen L. Hayes
KAREN L. HAYES
UNITED STATES MAGISTRATE JUDGE

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING FILED MARCH 2, 2005

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 03-31172

DWIGHT VINES; VAN MCGRAW

Plaintiffs - Appellees

v.

UNIVERSITY OF LOUISIANA AT MONROE; BOARD OF SUPERVISORS OF THE UNIVERSITY OF LOUISIANA SYSTEM

Defendants - Appellants

Appeal from the United States District Court for the Western District of Louisiana, Monroe

ON PETITION FOR REHEARING AND REHEARING EN BANC

(Opinion 1/28/05, 5 Cir., _____, _____ F.3d _____)

Before KING, Chief Judge, and SMITH and GARZA, Circuit Judges.

Appendix D

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

s/ Emilio M. Garza
United States Circuit Judge

AUG 4 - 2005
OFFICE OF THE CLERK

(2)

No. 04-1615

In the Supreme Court of the United States

DWIGHT VINES AND VAN MCGRAW,
Petitioners,

v.

THE UNIVERSITY OF LOUISIANA AT MONROE
AND THE BOARD OF TRUSTEES,
UNIVERSITY OF LOUISIANA SYSTEM,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION TO DWIGHT VINES' AND VAN MCGRAW'S PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

The Equal Employment Opportunity Commission (EEOC) filed a suit in federal court against Respondents, the University of Louisiana at Monroe (University) and the Board of Supervisors of the University of Louisiana System (Board), expressly naming Petitioners, Dwight Vines (Vines) and Van McGraw (McGraw), as the alleged "aggrieved parties" and seeking "make-whole" relief on their behalf under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et. seq.* (ADEA). After four years of litigation, with Vines and McGraw actively assisting the EEOC, the ADEA claims were dismissed summarily by a final federal court judgment dated July 18, 2001. [See Appendix 1]. Dissatisfied with the final judgment, Vines and McGraw seek to relitigate the exact same issues under Louisiana's age discrimination statutes, La. R.S. 23:971 and 51:2232, *et. seq.*,[1] in state court. The United States Fifth Circuit Court of Appeals, finding all elements of collateral estoppel satisfied, held that the relitigation exception to the Anti-Injunction Act barred Petitioners from relitigating the same issues in state court. Petitioners ask this Court to exercise its discretionary jurisdiction to review the Fifth Circuit's correct decision to protect and effectuate the final federal court judgment by enjoining the duplicative state litigation.

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[1] The Louisiana legislature has now combined the anti-discrimination laws into one statute entitled the Louisiana Employment Discrimination Law, La. R.S. 23:301, *et. seq.*

STATEMENT OF THE CASE AND CLARIFICATION OF THE RECORD

The parties' dispute arises out of a policy enacted by the Board that prohibits the re-employment of state retirees on a regular full-time basis, except under special circumstances. The policy was enacted to prevent individuals from "retiring" to take advantage of state paid retirement benefits (which are not taxed, are for life, and are equal to the retiree's pre-retirement salary) and immediately seeking full-time re-employment with the state for the purpose of increasing their state paid income, a practice known as "double-dipping" that has been criticized by taxpayers.

Vines and McGraw announced their "retirements" from high paying administrative positions at the University and immediately arranged to be rehired in non-tenured, low level teaching positions. While Louisiana law limits a rehired retiree's earnings to one-half his or her average final compensation,[2] as a result of their rehiring, Vines and McGraw increased their state pay by fifty percent while simultaneously significantly reducing their duties and responsibilities. When the policy against rehiring state retirees was enacted, the University did not renew Vines' and McGraw's annual contracts.

After filing charges with the EEOC, Vines and McGraw filed two identical suits in state and federal courts in Louisiana asserting claims of age discrimination under the ADEA and Louisiana's Employment Discrimination Law (LAEDL). The state court action was removed to federal court and consolidated with Petitioners' then pending federal

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[2] La. R.S. 11:707(A).

suit. When the EEOC filed a third action on Petitioners' behalf asserting the same age discrimination claims, that suit was also consolidated with Petitioners' previously filed suits (the Federal Suit). During this consolidation period, Petitioners' state law claims were dismissed summarily because they are time-barred. The ADEA claims asserted in Petitioners' own lawsuit were then dismissed in accordance with this Court's ruling in *Kimel v. Florida Board of Regents*. Although there was nothing to remand back to state court, the federal district court vacated its prior decision dismissing Petitioners' time-barred state law claims on the ground it lacked jurisdiction to render that decision in light of *Kimel*. Accordingly, Petitioners' time-barred state law age discrimination claims were remanded to state court (the State Suit). Those time-barred state law age discrimination claims that Petitioners seek to relitigate are the subject of their Petition to this Court.

Petitioners took no action on their state law age discrimination claims in the State Suit following the remand. Instead, they actively assisted the EEOC in the prosecution of the ADEA claims in the Federal Suit on their behalf. McGraw attended nearly every deposition in the Federal Suit. Vines and McGraw solicited other retirees to join in the Federal Suit. McGraw opposed Respondents' motion for summary judgment with his affidavit, and, the EEOC asserted the attorney client privilege on behalf of Vines and McGraw. While the Federal Suit was expanded at Vines' and McGraw's urging, the focus of the EEOC suit was always on Vines and McGraw. The pretrial order submitted by the parties to the district court aptly described the Federal Suit and its purpose as follows:

> This is an action under the Age Discrimination in Employment Act to correct alleged unlawful

> employment practices on the basis of age and to provide appropriate relief to Dwight Vines ("Vines") and Van McGraw ("McGraw") (collectively referred to as the "Identified Aggrieved Parties").

After four years of litigation, on cross-motions for summary judgment, the federal court dismissed the ADEA claims asserted by the EEOC on behalf of Vines and McGraw with prejudice. Yet, Petitioners have failed to provide this Court with this key ruling and made no reference to the federal court's express findings in their Petition. Because the federal court's reasons for the judgment against them are the crux of the case, the reasons for judgment are included in Respondents' appendix and highlighted below:

> . . . the Court finds that Defendants **have presented legitimate, non-discriminatory reasons for paying lower salaries to and not renewing the contracts of Vines and McGraw**. . . .The Court further finds that the EEOC **has not produced sufficient evidence to show that the reasons were a pretext for age discrimination.** As pointed out by Defendants, Vines and McGraw were reappointed to non-tenured faculty positions and were teaching entry-level courses. They were no longer high-level administrators and could not expect to be paid as such. Further, whether or not the Board has approved the re-employment of state retirees under exceptions to its policy, **there is *no evidence* that Vines' and McGraw's contracts were not renewed *because of their age***.

[App. at 1b at 17] [emphasis added].

Although Petitioners concede that after four years of litigation there was a judgment by a court of competent

jurisdiction in the ADEA lawsuit brought by the EEOC, and that it was a final judgment on the merits, Petitioners contend that they have not had their day in court. The Fifth Circuit Court of Appeals disagreed. To protect and effectuate the final federal court judgment, the Fifth Circuit ordered the federal district court to enjoin Vines' and McGraw's duplicative State Suit under the relitigation exception to the Anti-Injunction Act, 28 U.S.C. § 2283.

Without citing this Court's ruling in *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518 (1986), Petitioners attempt to argue that the Louisiana courts have definitively determined that *res judicata* and collateral estoppel do not bar their effort to relitigate in the State Suit the same issues already decided against them in the Federal Suit. [Pet. p. ii, 10]. In *Parsons Steel*, this Court held that a federal injunction barring relitigation of matters adjudicated by a valid and final federal decree is available up until the time the state court has "**finally** rejected a claim of *res judicata.*" *Parsons Steel,* 474 U.S. at 524 [emphasis added]. The Fifth Circuit Court of Appeals thoughtfully considered the issue of whether it could enjoin the state court litigation in light of this Court's decision in *Parsons Steel* and found that because the Louisiana courts had not entered a final judgment on the *res judicata*/collateral estoppel issue it was not precluded from entering an injunction pursuant to the relitgation exception of the Anti-Injunction Act. [Pet. App. A6-A8]. Petitioners' fail to disclose that, under Louisiana law, interlocutory rulings, like the Louisiana Second Circuit Court of Appeal's reversal of a peremptory exception of *res judicata* or a writ denial by the Louisiana Supreme Court, are non-final rulings subject to later review. Because the Louisiana courts have not entered a final judgment on the *res judicata*/collateral estoppel issue, there was no impediment to application of the relitigation exception under *Parsons Steel*.

VINES' AND MCGRAW'S ASSERTED CLAIM

Vines and McGraw assert that "because Congress only authorized the EEOC to represent individuals with respect to the ADEA . . .[t]he Fifth Circuit's decision to declare the EEOC to be the Petitioners' representative for their state law claims amounts to an impermissible extension of the federal EEOC's representative authority to state antidiscrimination statutes." [Pet. p. 16]. Petitioners ignore the fact that issue preclusion, also known as collateral estoppel, applies to prevent **issues of ultimate fact** from being relitigated between the same parties or their privies in a future lawsuit if those issues have once been determined by a valid and final judgment. *Ashe v. Swenson*, 397 U.S. 436, 443 (1970). That the EEOC did not litigate Vines' and McGraw's state law age discrimination claims is readily conceded. However, under the doctrine of collateral estoppel, that does not matter. What matters is that the age discrimination issues in both suits are identical and were decided squarely against the Petitioners in a final federal court judgment. Moreover, the doctrine of representative claim preclusion applies equally regardless of the sequence in which the duplicative suits are filed. *EEOC v. U.S. Steel Corp.*, 921 F.2d 489, 493 (3rd Cir. 1990).

REASONS FOR DENYING PETITIONERS' REQUEST

I. VINES AND MCGRAW HAVE NOT ARTICULATED ANY COMPELLING REASON TO JUSTIFY DISCRETIONARY REVIEW BY THIS COURT

"Review on a writ of certiorari is not a matter of right, but of judicial discretion." Sup. Ct. R. 10. "A petition for a writ of certiorari will be granted only for compelling reasons." *Id.* Vines and McGraw have not presented any compelling reason for this Court to exercise discretionary jurisdiction to permit them to relitigate in state court the same issues previously litigated by their privy, the EEOC, in the Federal Suit. Indeed, their key complaint, that they should be allowed to litigate their "state law" age discrimination claims, as opposed to the federal ADEA claims previously litigated on their behalf, was squarely addressed by the Fifth Circuit.

The ADEA and Louisiana age discrimination claims at issue arise from the same set of facts, present the same issues, and are subject to the same legal standards. In both the Federal and State Suits, monetary, make-whole relief was sought for Vines and McGraw. The ADEA and the Louisiana age discrimination statutes are "substantively similar, and federal and state courts routinely follow cases interpreting the ADEA when evaluating claims brought under the LAEDL, recognizing the same burden of proof and defenses." [Pet. App. A-17 and cases cited therein]. Because the issues presented in the State Suit are precisely the same as the issues decided in the Federal Suit, the doctrine of collateral estoppel bars relitigation of all issues of ultimate fact that have been determined by the valid prior Federal Suit judgment. Petitioners identify no conflict in the circuit (or other) courts on this issue because there is none.

II. THE FIFTH CIRCUIT DID NOT ERR IN DECIDING THIS CASE

The Fifth Circuit's conclusion that privity existed between the EEOC and Petitioners in the Federal Suit and that the EEOC adequately represented Vines and McGraw is supported by the record and well settled federal law.

In the Federal Suit, the EEOC named Vines and McGraw as the "alleged aggrieved parties" and sought individualized, monetary, "make-whole" relief on their behalf, under the ADEA, based on the same alleged age discrimination that forms the basis of Vines' and McGraw's State Suit.

The EEOC vigorously represented Vines and McGraw in the Federal Suit. The EEOC conducted written discovery, took numerous depositions, and asserted the attorney client privilege on their behalf. Indeed, the EEOC insisted that, as "parties" to the Federal Suit, Vines and McGraw were entitled to attend all depositions, and McGraw did, in fact, attend nearly every deposition. The EEOC filed two motions for summary judgment on the merits of Vines' and McGraw's claims and vigorously opposed Respondents' dispositive motions. Vines and McGraw closely followed and actively participated with the EEOC in its prosecution of the ADEA claims, and even recruited other individuals to join them and accept representation by the EEOC in the Federal Suit. In addition, they submitted affidavits in support of the EEOC's motion for summary judgment. Under these facts and general principles of representational law, the EEOC was Vines' and McGraw's privy for purposes of *res judicata* and collateral estoppel. Restatement (Second) of Judgments § 41 (2002) ("[a] person who is not a party to an action but who is represented by a party is bound by and entitled to the benefits of a judgment as though he were a party").

Moreover, it is well settled that a judgment in an action in which a government agency or officer represents private individuals is binding on those individuals. *Heckman v. United States*, 224 U.S. 413, 445-46, 32 S.Ct. 424, 56 L.Ed. 820 (1912). In fact, the Restatement (Second) of Judgments § 41(1) explains "that a person is considered to be represented by another party who is . . . 'an official or agency invested by law with authority to represent the person's interests.'" Here, the EEOC is an agency expressly invested by law with authority to represent the interests of individuals allegedly aggrieved by discriminatory practices.

By statute Congress expressly has empowered the EEOC to represent alleged aggrieved individuals in civil enforcement actions against employers and to recover monetary or "make-whole" relief for them. 29 U.S.C. § 626 and 29 U.S.C. § 216(c). Accordingly, by statute, when the EEOC initiates litigation to enforce an employee's rights under the ADEA, it becomes the individual's legal representative as a matter of law. Although the ADEA does not require that a previously filed action by an employee be dismissed automatically when the EEOC files suit on the individual's behalf, there is no question that under the distinctive enforcement scheme of the ADEA, a relationship of privity exists between the EEOC and alleged aggrieved individuals such that a lawsuit litigated by either the EEOC or the individual bars subsequent relitigation of the same claims or issues. *EEOC v. U.S. Steel Corp*, 921 F.2d at 493-94; *EEOC v. Harris Chernin, Inc.*, 10 F.3d 1286, 1291 (7th Cir. 1993); *EEOC v. Kidder, Peabody & Co.*, 156 F.3d 298, 300-1 (2nd Cir. 1988); *EEOC v. TIC – The Industry Company, et al.*, 2002 U.S. Dist. LEXIS 22728 *9 (E.D. La. 2002); *U.S. Steel* and *Bauman v. Jacob Suchard, Inc.*, 136 F.R.D. 460, 461 (N.D. Ill. 1990); *Mohammed v. May Department Stores*, 273 F.Supp.2d 531 (Del. 2003).

In *Victa* v. *Merle Norman Cosmetics, Inc.*, 19 Cal.App.4th 454, 24 Cal.Rptr.2d 117 (1993), the case on which Petitioners so heavily rely, the California state court properly recognized that privity may exist between the EEOC and those it represents. *Id.* at 468 ("This decision does not stem from or signify a general disavowal of the EEOC's capacity to stand in privity with a claimant in an ADEA case."). The *Victa* court's conclusion that the EEOC and Victa were not in privity "derive[d] from the particular facts of the case at hand, which in our view compel the conclusion reached." *Id.* Those facts were that in entering into a consent judgment with the defendant for injunctive relief only, without consideration of relief for the individual, the EEOC was not representing Victa's interests. In the Federal Suit, the EEOC represented Vines and McGraw through final judgment, filing two dispositive motions on its claims for "make-whole" relief on their behalf and vigorously opposing Respondents' dispositive motions.

Unlike *Victa*, where there was no consideration of or finding on the issue of discrimination, the issue of whether Vines and McGraw were discriminated against because of age has been definitively decided by a valid and binding federal court judgment after four years of litigation. The district court dismissed the EEOC's age discrimination claims on behalf of Vines and McGraw because it found **Respondents had legitimate, nondiscriminatory reasons for their employment decisions with regard to Vines and McGraw and there was no evidence to support the conclusion that age was a factor.** In light of the district court's specific findings, which were essential to the district court's judgment of dismissal with prejudice, the issue presented here is how can Vines and McGraw litigate their state court claims of age discrimination without violating the doctrine of collateral

estoppel? As the Fifth Circuit properly recognized, the answer is simple. They cannot.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

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APPENDIX 1

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

CONSOLIDATED FILE
CIVIL ACTION NO. 3:97CV0873
(3:97CV1095)
3:98CV0010

[Filed July 18, 2001]

Dr. Dwight Vines and Dr. Van McGraw	)
	)
v.	)
	)
University of Louisiana at Monroe and	)
the Board of Supervisors of the University	)
of Louisiana System	)
	)
Consolidated with	)
	)
U.S. Equal Employment Opportunity	)
Commission	)
	)
v.	)
	)
The Board of Trustees of the University	)
of Louisiana System and the	)
University of Louisiana at Monroe	)
	)

JUDGE ROBERT G. JAMES
MAG. JUDGE KAREN L. HAYES

RULING

This case arises out of Plaintiff U.S. Equal Employment Opportunity Commission's ("EEOC") allegations of age discrimination against Defendants the University of Louisiana at Monroe ("ULM") and the Board of Supervisors of the University of Louisiana System ("the Board"). On May 11, 2001, Magistrate Judge Karen L. Hayes issued a Report and Recommendation [Doc. #246] on four motions. She recommended that this Court deny two motions filed by the EEOC: "Motion for Partial Summary Judgment on the Issue of Liability Based on the Failure of Business Necessity" [Doc. #162] and a motion in limine to exclude certain of Defendants' defenses [Doc. #214]. Additionally, the Magistrate Judge recommended that this Court deny two defense motions: "Motion to Dismiss the EEOC's Representative Claims" [Doc. #165] filed by ULM and a motion for summary judgment [Doc. #201] filed jointly by ULM and the Board.

Defendants timely objected to the Magistrate Judge's Report and Recommendation, and the EEOC timely responded to Defendants' objections. The EEOC did not file any objections regarding the Magistrate Judge's recommendations on its motions.

When a party files timely objections to a magistrate judge's report and recommendation, the district court conducts a de novo review of those portions of the report. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72. Having conducted a de novo review of the Magistrate Judge's report, Defendants' objections, Plaintiff's responses, and the entire

record in this case, the Court adopts the Magistrate Judge's Report and Recommendation in part and declines to adopt it in part The Court ADOPTS the Magistrate Judge's Report and Recommendation denying (1) Plaintiff's "Motion for Partial Summary Judgment on the Issue of Liability Based on the Failure of Business Necessity" [Doc. #162], (2) Plaintiff's motion in limine to exclude certain of Defendants' defenses [Doc. #214], and (3) ULM's "Motion to Dismiss the EEOC's Representative Claims" [Doc. #165]. However, the Court DECLINES TO ADOPT the Magistrate Judge's Report and Recommendation denying Defendants' joint motion for summary judgment [Doc. #201] and, instead, GRANTS Defendants' motion for summary judgment.

Although not addressed by the Magistrate Judge in her Report and Recommendation, the Board raises an additional objection [Doc. #253], asserting that it is immune from suit under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, *et seq.*, pursuant to the Supreme Court's decision in *Kimel v. Florida Bd. of Regents,* 528 U.S. 62, 120 S. Ct. 631, 647, 145 L. Ed.2d 522 (2000) and post-*Kimel* case law. Consistent with the previous rulings of the Court and the Magistrate Judge and with applicable case law, the Court OVERRULES this objection.

I. Eleventh Amendment Immunity

In its objection memorandum, the Board argues that *Kimel* bars the EEOC from seeking monetary damages against it, an agent of the State, under the Eleventh Amendment. *Kimel* prohibits employees and former employees from pursuing an ADEA action for monetary damages against the state in federal court. *See* 528 U.S. at 91. By analogy, the Board contends that the EEOC should not be permitted to seek monetary damages as a representative of former employees.

The EEOC responds that the Court and the Magistrate Judge have previously ruled on this issue and rejected the Board's argument and that its argument should be rejected once again.

In an earlier Report and Recommendation, the Magistrate Judge examined *Kimel* and recommended that the EEOC be permitted to proceed with this lawsuit. *See* March 23, 2000, Report and Recommendation. The Court adopted that recommendation. *See* May 26, 2000, Judgment (affirming the Report and Recommendation).[1] The Court again refers the parties to the Magistrate Judge's well-reasoned analysis. For additional clarification, the Court cites the parties to the post-*Kimel* decision of a federal district court in Massachusetts, which is consistent with the Court's earlier ruling and which succinctly explains why the Board's argument fails:

> The [Supreme] Court's decision in *Kimel* holds "only that, in the ADEA, Congress did not validly abrogate the States' sovereign immunity to suits by private individuals." 528 U.S. at 91,120 S. Ct. 631. That is, because the ADEA is not legislation authorized by § 5 of the Fourteenth Amendment, a private litigant seeking money damages cannot defeat the State's Eleventh Amendment immunity. Although, as the Court states, "the ADEA is not 'appropriate

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[1] The Magistrate Judge's March 23, 2000, Report and Recommendation also recommended that the EEOC be permitted to present evidence of disparate impact liability at trial. In its May 26, 2000, Judgment, this Court affirmed her recommendation. However, in light of further briefing by the parties and the following decision of the Court that disparate impact is not a viable theory of recovery under the ADEA, the Court reverses its earlier ruling on this issue.

> legislation' under § 5 of the Fourteenth Amendment," *id.* at 82-83, 120 S.Ct. 631, *Kimel's* holding does not vitiate the Supreme Court's earlier decision in *EEOC v. Wyoming,* 460 U.S. 226, 103 S.Ct. 1054, 75 L. Ed.2d 18 (1983), which held that the extension of the ADEA to cover State and local governments is a valid exercise of Congress' authority under the Commerce Clause, U.S. Const. Art. I, § 8, cl. 3, and rejected a challenge to the ADEA based on the Tenth Amendment. *See id.* at 235, 103 S.Ct. 1054.

State Police for Automatic Retirement Ass'n v. Difava, 138 F. Supp.2d 142, 145-46 (D. Mass. 2001). Further, the Supreme Court has repeatedly admonished "that a State's immunity under the Eleventh Amendment is inapplicable where a State is sued by the federal government, even for money damages. *Id.* at 146 *(citing Alden v. Maine,* 527 U.S. 706, 755, 119 S. Ct. 2240, 144 L. Ed.2d 636 (1999); *Seminole Tribe of Fla. v. Florida,* 517 U.S. 44, 49 n. 14, 116 S. Ct. 1114, 134 L. Ed.2d 252 (1996); *United States v. Texas,* 143 U.S. 621, 644-645, 12 S. Ct. 488, 36 L. Ed. 285 (1892)).

This Court finds that the Eleventh Amendment does not bar a lawsuit under the ADEA by an agency of the federal government, such as the EEOC, even when the agency seeks money damages. Accordingly, the Board's objection on Eleventh Amendment grounds [Doc. #253] is OVERRULED.

II. Disparate Impact Liability under the ADEA

The EEOC has alleged that Defendants' violated the ADEA by adopting and enforcing a policy that allegedly has

a disparate impact on persons in the protected age class,[2] Defendants object to the Magistrate Judge's recommendations on the disparate impact claims for two reasons: (1) because disparate impact is not a viable theory of liability under the ADEA and (2) because the EEOC has not produced the proper statistical evidence to support such a claim.

A. Viability of Disparate Impact as a Theory of Liability under the ADEA

In her Report and Recommendation, the Magistrate Judge found that the Court is "'constrained to recognize disparate impact liability under the ADEA'" because of the Fifth Circuit's ruling in *EEOC v. General Dynamic Corp.*, 999 F.2d 113 (5th Cir. 1993), that it was an abuse of discretion for a district court to exclude expert evidence on a disparate impact claim. *May 11, 2001, Report and Recommendation* ("*May 11, 2001, R & R*"), p. 6. While acknowledging the split among courts on the viability of disparate impact claims under the ADEA, the Magistrate Judge concluded, based on *General Dynamic* and the legislative history of the Act, that the Court must assume the availability of disparate impact and disparate treatment claims under the ADEA.

Defendants contend that the Magistrate Judge erred. They disagree with the Magistrate Judge's reliance on *General Dynamic*. The Fifth Circuit's ruling in that case was issued prior to the Supreme Court's decision in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), where Justice Kennedy questioned the viability of disparate impact liability under the

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[2] The Magistrate Judge has set forth the EEOC's specific allegations under this theory, and the Court will not re-state them here. *See* May 11, 2001, Report and Recommendation, pp. 1-2.

ADEA. Moreover, the Fifth Circuit emphasized that it "express[ed] no opinion as to the merits of the EEOC's disparate impact claim." *Id.* at 117 n.2 (emphasis added). Instead, Defendants would have the Court rely on more recent case law in this and other jurisdictions where the courts have either questioned or rejected the viability of disparate impact claims under the ADEA.

In further support, Defendants compare the ADEA to the Equal Pay Act ("EPA), 29 U.S.C. 206(d). The EPA prohibits employers from discriminating against employees on the basis of sex, but allows "a differential based on any factor other than sex," while the ADEA prohibits age discrimination, but allows "differentiation . . . based on reasonable factors other than age." *Cf.* 29 U.S.C. § 206(d)(1) to 29 U.S.C. § 623(f)(1). The Supreme Court previously held in *Washington v. Gunther,* 452 U.S. 161 (1981), that there is no disparate impact liability under the EPA, and, given its similar language, Defendants assert that this Court should find that there is no disparate impact liability under the ADEA.

Finally, Defendants argue that this Court should not recognize a disparate impact cause of action under the ADEA when Congress has not done so. Congress amended Title VII in 1991, adding a disparate impact cause of action, but did not amend the ADEA. Although Defendants contend that this alone is reason for the Court to refuse to recognize disparate impact liability, they also object to the Magistrate Judge's disregard of a recent Supreme Court decision, *Alexander v. Sandoval,* 121 S. Ct. 1511 (2001). Defendants contend that *Sandoval* stands for the proposition that no cause of action for disparate impact exists if Congress has not expressly authorized or written that cause of action into the governing statute.

The EEOC responds that the Magistrate Judge properly relied on the Fifth Circuit's implicit holding in *General Dynamic* to find that disparate impact is a viable theory of liability under the ADEA In its estimation, the dictum of three concurring and dissenting judges in the more recent *Rhodes* decision should not be given the weight of *General Dynamic*.

Further, the EEOC agrees with the Magistrate Judge that the Supreme Court's decision in *Sandoval* is irrelevant. In that case, the Supreme Court examined Title VI of the Civil Rights Act of 1964, which is not an employment statute and which does not provide a private cause of action *at all*. The EEOC argues that a private cause of action is available under the ADEA; the only question is under what legal theory.

Having considered the applicable case law, the arguments of the parties, and the analysis of the Magistrate Judge, the Court declines to adopt the Magistrate Judge's Report and Recommendation. The Court agrees with the Magistrate Judge that there is no clear precedent in the Fifth Circuit. Nevertheless, a review of the case law in this jurisdiction after Justice Kennedy's comments in *Hazen Paper* suggests that disparate impact is not a viable theory of liability under the ADEA. In a 1996 Fifth Circuit case, *Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 1004 (5th Cir. 1996), Circuit Judge DeMoss, joined by Circuit Judges Smith and Barksdale, wrote a partial concurrence and partial dissent and stated: "*Hazen Paper* indicates that disparate impact theory is not available under the ADEA." Another federal district court in this Circuit recently relied on *Rhodes* and *Hazen Paper* and declined to recognize disparate impact liability under the ADEA. *Camp v. Lockheed Martin Corp.*, 1998 U.S. Dist. Lexis 1692 (S.D. Tex. 1998). Although its decision has no precedential weight with this Court, a Louisiana appellate court decision also squarely held that "a disparate impact

theory of discrimination is not cognizable under the ADEA." *O'Boyle v. Louisiana Tech Univ.*, 741 So.2d 1289 (La. App. 2 Cir. 1999).

Significantly, since the parties filed their briefs in this case, the Eleventh Circuit Court of Appeals issued a decision holding that, as a matter of first impression, disparate impact claims may not be brought under the ADEA. *Adams v. Florida Power Corp.*, —F.3d—, 2001 WL 754477 (11th Cir. July 5, 2001). The Eleventh Circuit's decision is not binding on this Court, but its reasoning is persuasive. The Eleventh Circuit explained the significance ofthe Supreme Court's decision *in Hazen Paper* as follows:

> [W]hile the *Hazen* [*Paper*] Court left open the question of whether a disparate impact claim can be brought under the ADEA, language in the opinion suggests that it cannot. First, the Court noted that "[d]isparate treatment . . . captures the essence of what Congress sought to prohibit in the ADEA.". . . In addition, the Court reiterated that, in making employment decisions, the use of factors correlated with age, *such as pension status,* did not rely on "inaccurate and stigmatizing stereotypes" and was acceptable . . . That position is inconsistent with the viability of disparate impact theory of liability, which requires no demonstration of intent, but relies instead on the very correlation between the factor used and the age of those employees harmed by the employment decision to prove liability.

Id. at *3 (emphasis added) (citations omitted).

Additionally, while the Court agrees with the Magistrate Judge and the EEOC that *Sandoval* is irrelevant to this case, the Court also finds it persuasive that Congress amended Title VII in 1991 to specifically include a cause of action for disparate impact, but failed to amend the ADEA to do the same.

In light of these and other considerations well-briefed by the parties, the Court concludes that disparate impact is not a viable theory of recovery under the ADEA.

B. Analysis of EEOC's Disparate Impact Claims

Even if disparate impact were a viable theory of liability, the EEOC has not established such a claim. It is undisputed by the parties that the EEOC has identified a policy which allegedly creates a disparate impact on workers forty years of age or older. However, the parties dispute whether the EEOC has met its burden of demonstrating that the policy actually *has* a disparate impact.

The Magistrate Judge relied on the Supreme Court's decision in *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S. Ct. 849, 28 L. Ed. 2d 158 (1971), as providing the proper test for disparate impact claims: whether the policy affects members of the protected group more than it affects non-members. Based on the record evidence, she found that the challenged policy in this case appears to affect *only* members of the protected age class, and, thus, ruled that the EEOC had established a prima facie case.

Although Defendants raised legitimate business reasons for their actions, the Magistrate Judge found genuine issues for trial because the EEOC "challenge[d] the legitimacy and sufficiency of the defendants' justification, and argue[d] that

there were other means of achieving any legitimate purpose the defendants may have had which would not have a discriminatory effect." *May 11, 2001, R&R*, p. 13.

Defendants object to the Magistrate Judge's approach, contending that disparate impact analysis does not apply where the policy at issue affects, for a reason other than age, only a small subgroup of the prorated class. The EEOC cannot establish a prima facie case merely by stating that all members of the subgroup of Louisiana state retirees affected by the policy are forty years of age or older.

Rather, citing *Watson v. Fort Worth Bank & Trust,* 487 U.S. 977, 108 S. Ct. 2777, 101 L. Ed.2d 827 (1988), Defendants contend that the ADEA requires the EEOC to make a statistical comparison. The EEOC must compare the number of individuals in the protected group excluded by the policy and the number of individuals in the non-protected group and show that there is a "statistically significant" disparity between the two groups. Defendants argue that neither the EEOC nor the Magistrate Judge has cited any case where a prima facie case of disparate impact liability has been stated without any comparative statistical evidence offered.

The EEOC agrees with the Magistrate Judge that statistical proof in a disparate impact case need only show that a "challenged practice more harshly affects the protected group" and argues that it has met this requirement. According to the EEOC, it has established a prima facie case of disparate impact liability because the policy is directed at state retirees and all non-disabled state retirees (100%) are forty years of age or older. Singling out state retirees is simply a way for Defendants to target older workers.

The Court finds that, even if disparate impact is a viable theory of recovery under the ADEA, the EEOC has failed to meet its prima facie burden. While it is true that only persons in the protected age group are affected by the policy, they are affected because of their status as state retirees, not because of their age. Prevailing case law requires the EEOC to make *some comparison* to establish a "causal connection [between the policy and] . . . a class based imbalance in the work force." *Anderson v. Douglas & Lomason Co., Inc.*, 26 F.3d 1277, 1284 (5th Cir. 1994) (quoting *Pouncy v. Prudential Ins. Co.*, 668 F.2d 795, 800 (5th Cir. 1982)). However, the EEOC has made no attempt to show what overall effect the policy has on the protected age class of workers at ULM or within the Board system and, thus, has not shown any imbalance in the workforce. Indeed, as the Magistrate Judge noted, all persons in Vines and McGraw's department at ULM were over the age of forty.

Therefore, Defendants' motion for summary judgment is GRANTED as to the EEOC's disparate impact claims.

III. Disparate Treatment Liability under the ADEA

The EEOC also alleges that Defendants violated the ADEA under a disparate treatment theory. The Magistrate Judge employed the standard burden-shifting paradigm and determined that the EEOC raised genuine issues of material fact for trial. First, she found that the EEOC had established a prima facie case on behalf of Vines and McGraw. Both persons were in the protected age class, qualified for their positions, and subject to adverse actions (i.e., lower pay and non-renewal of their contracts). The Magistrate Judge was presented with no evidence that Vines and McGraw were replaced by younger persons. Instead, she relied on statements by Defendants' representative referring to the hiring of "new

people" with "fresh energy" and explaining that retired persons have "given up," have "had it," have a lower level of energy, and want "to have a quieter life" as evidence that actions were taken against Vines and McGraw because of their age.

Based on the Supreme Court's decision in *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 120 S. Ct. 2097, 147 L. Ed.2d 105 (2000), the Magistrate Judge ruled that these same statements were sufficient evidence to raise a genuine issue of fact for trial whether Defendants' reasons for their actions were pretext for discrimination.

Defendants contend (1) that the EEOC cannot establish its prima facie case by relying on stray remarks, (2) that they have produced legitimate, non-discriminatory reasons for not renewing Vines' and McGraw's contracts and paying them lower salaries, and (3) that the EEOC cannot produce sufficient evidence that those reasons were pretext for discrimination.

First, Defendants cite the Fifth Circuit's stringent requirement for stray remarks to serve as evidence of discrimination: the remarks must be (1) related to the protected class of persons of which the plaintiff is a member, (2) proximate in time to termination, (3) made by an individual with authority over the employment decision at issue, and (4) related to the employment decision at issue. *Auguster v. Vermillion Parish Sch. Bd.*, 249 F.3d 400, 405 (5th Cir. 2001) (citing *Krystek v. Univ. Of S. Miss.*, 164 F.3d 251, 256 (5th Cir. 1999) (other citation omitted). The remarks in this case were made by James A. Callier ("Callier"), the former President of the Board. Callier, who, Defendants point out, is a member of the protected class himself, recommended the policy, but was not involved directly in the decisions to

terminate Vines or McGraw or to set their pay or teaching assignments. Defendants also point out that the statements were made in response to questioning by the EEOC during depositions taken years after the policy was adopted. Finally, Defendants contend that the statements were taken out of context to attribute age animus to innocuous words and clipped phrases.

Second, even if the EEOC met its prima facie burden, Defendants contend that they produced legitimate, non-discriminatory reasons for their actions. They argue that Vines and McGraw were paid commensurate with their duties as non-tenured faculty members and in accordance with La. Rev. Stat. § 11:707.[3] They further argue that the decision not to renew Vines' and McGraw's contracts was based on the

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[3] Although it has since been amended, at the time this lawsuit was brought, La. Rev. Stat. § 1 1:707 provided as follows:

> A. Any person on retirement under the Teachers' Retirement System of Louisiana may be employed during the periods of July first through June thirtieth of any year; provided that his earnings in such employment do not exceed fifty percent of his average final compensation for such period. . . .
>
> B. **Should any retiree earn more than fifty percent of his average final compensation** as adjusted under Subsection A during the twelve-month period, **his retirement benefits** in the following twelve months immediately after the retirement system receives the employer's report shall be reduced during the following twelve **month period so that the total reduction equals one-half of the amount earned in excess of fifty percent of his average final compensation for the twelve-month period covered by the report.**

(emphasis added).

Board's age-neutral policy against hiring state retirees on a full time, regular, and continuous basis.

Third, Defendants contend that the EEOC has not rebutted these reasons with any competent evidence. In fact, according to Defendants, the evidence shows that ULM continues to employ numerous faculty members the same age or older than Vines and McGraw. In addition, Defendants point out that Vines and McGraw could have avoided the earnings limitation in La. Rev. Stat. § 11:707 by suspending their retirement benefits during their reemployment, as provided under La. Rev. Stat. § 11:737.

The EEOC contends (1) that it has met its prima facie burden, (2) that the reasons produced by Defendants for the actions taken against Vines and McGraw were not legitimate or reasonable, and (3) that it has produced evidence, through the remarks of Defendants' designated representative, that Defendants' allegedly non-discriminatory reasons were pretext for discrimination.

First, the EEOC contends that it met its prima facie burden because Vines and McGraw are over the age of forty, qualified for their positions, their contracts were not renewed, and they were replaced with younger people.

Second, the EEOC contends that Defendants have not produced a reasonable factor other than age for their actions against Vines and McGraw. Although Defendants claim to discriminate only against state retirees, the EEOC finds nothing "reasonable" about this basis. The EEOC argues that there is no evidence that "double-dipping" (i.e., state retirees receiving full retirement benefits while returning to work and receiving a full salary from the state) was a problem because the Board approved the re-employment of 335 of 335 state

retirees when the universities asked to keep them. In addition, the EEOC argues that Defendants' reliance on state retiree status "by definition" targets older workers. Finally, the EEOC contends that La. Rev. Stat. 11:707, on which Defendants base their policy, does not impose an earnings limitation.

Third, the EEOC contends that the discriminatory remarks relied upon by the Magistrate Judge are sufficient evidence of pretext to withstand Defendants' summary judgment motion. Although Defendants characterize the statements as "stray remarks by a nondecisionmaker," the EEOC points out that Callier made the remarks at a Fed. 11. Civ. P. 30(b)(6) deposition; therefore, according to the EEOC, his statements were the statements *of the Board* and those of a decisionmaker. In addition, Callier and Carroll Falcon ("Falcon") were the two principals most directly involved in the development of the policy against re-hiring state retirees at full salary.

The Court finds that the EEOC has established a prima facie case of discrimination. Vines and McGraw were forty years of age, qualified to perform their jobs, did not have their contracts renewed, and were allegedly replaced by younger persons.[4]

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[4] Although this case has been on-going since 1997, the EEOC has presented evidence for the first time in responses to Defendants' objections to the Magistrate Judge's Report and Recommendation that Vines and McGraw were replaced by younger persons. Though this evidence was not presented to the Magistrate Judge, the Court will exercise its discretion and consider this argument and supporting evidence as well as those properly presented to the Magistrate Judge.

However, the Court finds that Defendants have presented legitimate, non-discriminatory reasons for paying lower salaries to and not renewing the contracts of Vines and McGraw, as set forth fully above. The Court further finds that the EEOC has not produced sufficient evidence to show that the reasons were pretext for age discrimination. As pointed out by Defendants, Vines and McGraw were re-appointed to non-tenured faculty positions and were teaching entry-level courses. They were no longer high-level administrators and could not expect to be paid as such. Further, whether or not the Board has approved the re-employment of state retirees under exceptions to its policy, there is no evidence that Vines' and McGraw's contracts were not renewed *because of their age*. Having reviewed Callier's deposition, the Court finds that his statements were taken out of context and further that they are not indicative of age animus. There is no evidence that Callier had any involvement in the decisions regarding Vines and McGraw. Thus, his comments are not the type of evidence sufficient to establish pretext.

Accordingly, Defendants' joint motion for summary judgment on the EEOC's disparate treatment claims is GRANTED.

IV. CONCLUSION

For the foregoing reasons, the Court adopts in part and declines to adopt in part the Report and Recommendation of the Magistrate Judge [Doc. #246]. The Court adopts the Magistrate Judge's Report and Recommendation and DENIES (1) the EEOC's "Motion for Partial Summary Judgment on the Issue of Liability Based on the Failure of Business Necessity" [Doc. #162], (2) the EEOC's motion in limine to exclude certain of Defendants' defenses [Doc. #214], and

(3) ULM's "Motion to Dismiss the EEOC's Representative Claims" [Doc. #165].

The Court also finds that the Board's separate objection [Doc. #253] that it is entitled to Eleventh Amendment immunity is OVERRULED.

Finally, the Court declines to adopt the Magistrate Judge's Report and Recommendation on Defendants' joint motion for summary judgment [Doc. #201]. Defendants' joint motion for summary judgment is GRANTED, and this case is DISMISSED WITH PREJUDICE.

MONROE, LOUISIANA this 18 day of July, 2001.

/s/_____
ROBERT G. JAMES
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

CONSOLIDATED FILE
CIVIL ACTION NO. 3:97CV0873
(3:97CV1095)
3:98CV0010

[Filed July 18, 2001]

Dr. Dwight Vines and Dr. Van McGraw	)
	)
v.	)
	)
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the Board of Supervisors of the University	)
of Louisiana System	)
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v.	)
	)
The Board of Trustees of the University	)
of Louisiana System and the	)
University of Louisiana at Monroe	)
	)

JUDGE ROBERT G. JAMES
MAG. JUDGE KAREN L. HAYES

JUDGMENT

For the reasons set forth in this Court's ruling:

The Court adopts in part and declines to adopt in part the Report and Recommendation of the Magistrate Judge [Doc. #246].

The Court adopts the Magistrate Judge's Report and Recommendation and, IT IS HEREBY ORDERED THAT (1) the EEOC's "Motion for Partial Summary Judgment on the Issue of Liability Based on the Failure of Business Necessity" [Doc. #162], (2) the EEOC's motion in limine to exclude certain of Defendants' defenses [Doc. #214], and (3) ULM's "Motion to Dismiss the EEOC's Representative Claims" [Doc. #165] are DENIED.

IT IS FURTHER ORDERED that the Board's separate objection [Doc. #253] that it is entitled to Eleventh Amendment immunity is OVERRULED.

Finally, the Court declines to adopt the Magistrate Judge's Report and Recommendation on Defendants' joint motion for summary judgment [Doc. #201]. IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Defendants' joint motion for summary judgment is GRANTED, and this case is DISMISSED WITH PREJUDICE, each party to bear its own costs.

MONROE, LOUISIANA this 18 day of July, 2001.

/s/_____
ROBERT G. JAMES
UNITED STATES DISTRICT JUDGE

(3)

FILED
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SUPREME COURT, U.S.

No. 04-1615

IN THE

Supreme Court of the United States

DWIGHT VINES and VAN McGRAW,

Petitioners,

v.

UNIVERSITY OF LOUISIANA AT MONROE and BOARD OF SUPERVISORS OF THE UNIVERSITY OF LOUISIANA SYSTEM,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF

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CORRECTIONS TO RESPONDENTS' STATEMENT OF CASE CLARIFICATION OF THE RECORD

On page 2 of Respondents' Opposition, by placing the word retiring in quotes, Respondents seek to cast the Petitioners in a negative light by implying that their actions in retiring from their administrative positions and returning to teach at the University of Louisiana at Monroe (ULM) was improper. This practice is allowed and specifically contemplated under the state laws governing the Teachers Retirement System of Louisiana (TRSL). Incorrectly, Respondents call it "double-dipping," a term for which they offer no evidence. Clearly the Petitioners were not "double-dipping" since they were earning a salary for the work they were doing teaching classes and they were properly collecting benefits from the TRSL pension plan into which they had paid and which system was patently aware of their new positions with ULM.[1] There is no evidence offered by the Respondents that taxpayers criticized this occurrence either generally or specifically. La. R.S. 11:707(A) did not limit the compensation to be paid retirees returning to employment, but only provided for the repayment of a limited amount of benefits if a salary exceeded a certain total. In fact, since the institution of the Board policy, the State of Louisiana implicitly endorsed the return of state retirees to employment by repealing the latter provision directing a partial repayment of benefits. The Petitioners' return to the classroom was not something that they arranged on their own, as Respondents imply, but was approved by ULM and which benefitted the State of Louisiana by returning highly qualified professors to the classroom upon the cessation of their administrative jobs.

---

1. Despite the Respondents' claim, their pension benefits were not equal to their pre-retirement salary, but rather involved a formula based upon the prior three years of service. Further, their pension benefits are not untaxed, as Respondents claim, but in fact are subject to federal income tax.

Respondents at the top of page 3 claim that the Petitioners' state claims of age discrimination are time-barred. Once again, Respondents skew the truth. Prior to dismissing Petitioners' ADEA causes of action in the federal suit based upon *Kimel v. Florida Board of Regents*, 528 U.S. 62, 120 S. Ct. 631, 145 L. Ed. 2d 522 (2000), the U.S. District Court granted Respondents' motion to dismiss Petitioners' state law age discrimination claims on the basis of prescription. However, because the Petitioners at the time still had their ADEA claims pending, they could not immediately appeal the U.S. District Court's ruling, which Petitioners steadfastly and vehemently contend is incorrect based upon Louisiana law and Louisiana antidiscrimination statutes. There has been no appellate review of this ruling because the U.S. District Court remanded the matter to the Louisiana state court. The U.S. District Court vacated its ruling because it lacked jurisdiction over the Petitioners' state age discrimination claims since the Petitioners had no personal claims under the ADEA. Therefore, the U.S. District Court remanded the Petitioners' state lawsuit to the Louisiana Court. The Louisiana courts have never issued any ruling pertaining to the timeliness of the Petitioners' state age discrimination lawsuit.

Other prevarications are contained in the next paragraph on page 3. Respondents claim, "Petitioners took no action on their state law age discrimination claims in the State Suit following remand. Instead they actively assisted the EEOC in the prosecution of the ADEA claims in the Federal Suit on their behalf." A recitation of events demonstrates this falsehood. On June 1, 2000, the Federal Court remanded the state lawsuit. On December 5, 2000, Petitioners served the second set of Interrogatories and Requests for Production of Documents to Respondents. On January 17, 2001, Petitioners served another set of Interrogatories and Requests for Production of Documents on Respondents. Petitioners, represented by their private counsel, were deposed for a second time on January 26, 2001.

Respondents conducted these depositions for both the lawsuit by the EEOC and Petitioners' state lawsuit. After receiving responses from Respondents, Petitioners proposed deposition dates to Respondents for several witnesses who worked for Respondent ULM. The scheduling of these depositions was hindered by the preexisting trial dates for the EEOC's Federal lawsuit against the Respondents. Respondents then received a decision in their Federal case against the EEOC on July 18, 2001, which they proceeded to use against the Petitioners in the Louisiana State Court by filing a peremptory exception of *res judicata* and/or collateral estoppel in mid-October 2001. From this point forward, Respondents refused to participate in any further discovery until the Louisiana state court resolved the Respondents' pending peremptory exception of *res judicata* and/or collateral estoppel.

Respondents make additional false assertions on page 3 for which they offer absolutely no evidence. Petitioners did not solicit class members for the EEOC's expansion of its Federal lawsuit, nor was it within their control to increase or decrease the scope of the EEOC's lawsuit. This function always remained within the purview of the EEOC. Petitioners participated in the EEOC suit to the extent that they were required to do so as Charging Parties. Respondents also are disingenuous by stating that the EEOC articulated the attorney client privilege ". . . on behalf of Vines and McGraw." In fact the EEOC claimed this privilege for its own benefit so as to not have to divulge to Respondents certain information which it had required Petitioners to give to the agency.

On page 4 of their opposition, Respondents cast aspersions on Petitioners for not having included the decision of the Federal Court in the EEOC case against Respondents. Petitioners did not do so because this judgment's validity and correctness are not germane to the inquiry herein. Rather, the issue of privity as it applies to collateral estoppel is the focus. Respondents then proceed to quote a lengthy passage from this decision to attempt

to sway this Court by denigrating Petitioners' claims. Petitioners point to the fact that the Magistrate Judge assigned to the EEOC's case against Respondents completed a Report and Recommendation on the cross Motions for Summary Judgment by Respondents and the EEOC in which she recommended against granting summary judgment in favor of either the Respondents or the EEOC. By contrast, she determined that there were sufficient issues of material fact that Respondents discriminated against Petitioners on the basis of age to deny Respondents' Motion for Summary Judgment. She further determined that there were sufficient issues of material fact for trial concerning the disparate impact of Respondents' policy against employing state retirees. This decision is included herein in Petitioners' appendix to this brief.

The EEOC always maintained full control over the prosecution of the EEOC's case against Respondents. Petitioners have not had any effect on the manner in which the EEOC proceeded against Respondents. Petitioners did not wield any power over the conduct of the litigation. Clearly, when the EEOC abandoned its appeal of the original U.S. District Court decision, Petitioners did not have any command over the agency because Petitioners desired review of what they considered to be an incorrect decision. Because of the potential for Charging Parties' interests to diverge from that of the EEOC, Congress allowed individuals to sue privately under the ADEA pursuant to 29 U.S.C. § 626(c)(1). Petitioners availed themselves of this right and filed their lawsuits in state and federal court months before the EEOC initiated its litigation. Early on, Petitioners thereby articulated their desire to control their litigation and not have the EEOC represent them with respect to their age discrimination claims, in particular, those under Louisiana state law.

Respondents on page 5 claim that Petitioners state in the issues that the "Louisiana courts have definitively determined

that res judicata and collateral estoppel do not bar their effort to relitigate in the State Suit the same issues already decided against them in the Federal Suit." A clear reading of Petitioners' statement of the issues demonstrates that Petitioners are not contending that the Louisiana courts have issued a final judgment on the Respondents' peremptory exception of res judicata/collateral estoppel. Rather, Petitioners point out that the Louisiana courts properly utilized Federal jurisprudence in resolving the issues of res judicata and collateral estoppel. Further, the case cited by Respondents, *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518 (1986), 474 U.S. 518, 106 S. Ct. 768, 33 L. Ed. 2d 552 (1986), is the beginning of the inquiry concerning a State Court judgment, not the end. As this Court explained in *Parsons Steel*, if a state court's decision is a final judgment under that state's law, then an injunction is prohibited under the relitigation exception to the Anti-Injunction Act. However, the issuance of an injunction is not mandated. The Federal Court must give further consideration to the questions of federalism, equity and comity in line with *Mitchum v. Foster*, 407 U.S. 225, 92 S. Ct. 2151, 32 L. Ed. 2d 705 (1972) and *Atlantic Coast Railroad Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 297, 90 S. Ct. 1739, 1758, 26 L. Ed. 2d 234, 243 (1970). It is within the discretion of the U.S. District Court to reject issuing an injunction, as the U.S. District Court did herein. The Fifth Circuit exceeded the scope of appropriate review in overturning the U.S. District Court's decision to deny the injunction.

In the section entitled "Vines' and McGraw's Asserted Claim," Respondents misapprehend the import of the significance that Congress only authorized the EEOC to represent a charging party with respect to causes of action under the ADEA, not the respective state antidiscrimination statutes. Regarding the concept of privity, any representative authority with which the EEOC is vested from Congress cannot extend to individual charging parties' claims under state law. The

existence of privity is an essential element of collateral estoppel as well as res judicata. The sequence of the filing of the lawsuits signifies that Petitioners have manifested that the EEOC is not their representative concerning their state law claims.

REASONS FOR GRANTING PETITIONERS' REQUEST

Respondents misstate the crux of the problem with the U.S. Fifth Circuit's decision finding that collateral estoppel can be used to bar Petitioners' state lawsuit by applying the Respondents' judgment against the EEOC to Petitioners. The question is not whether ". . . the issues presented in the State Suit are precisely the same as the issues decided in the Federal Suit . . . ," as the Respondents claim in paragraph 2 on page 7. Privity remains an element of finding collateral estoppel, just as it is in res judicata because of due process concerns. The Fifth Circuit's decision herein creates a conflict in the circuit courts of appeal focusing on the resolution of the privity issue. The Second Circuit in *Dunlop v. Pan American World Airways, Inc.*, 672 F.2d 1044 (2d Cir. 1982), determined that a private litigant's lawsuit could not be eliminated through the actions of the Secretary of Labor, the predecessor to the EEOC charged with enforcing the ADEA, in settling and dismissing claims, including that of the individual. Similarly, in *Burns v. Equitable Life Assurance Society of the United States*, 696 F.2d 21 (2d Cir. 1982), the Second Circuit refused to bar an woman from pursuing a lawsuit that she had filed prior to the filing of the Federal government's ADEA lawsuit, even though she was a named party and the Federal government concluded the Federal lawsuit with a consent decree. When the defendant employer in *Merle Norman Cosmetics, Inc. v. Victa*, 936 F.2d 466 (9th Cir. 1991) sought an injunction under the relitigation exception to the Anti-Injunction Act, the Ninth Circuit affirmed the District Court's denial of the injunction which it found to be within the District Court's discretion. The Eleventh Circuit in *Riddle v. Cerro Wire and Cable Group, Inc.*, 902 F.2d 918 (11th Cir. 1990)

noted that the interests of a private litigant and the EEOC can diverge, and when that occurs, privity does not exist. Therefore, an individual must be allowed to maintain his own action distinct from that of the EEOC. Recently in dictum in *EEOC v. Pemco Aeroplex*, 383 F.3d 1280 (11th Cir. 2004), the Eleventh Circuit reiterated its position on the issue of privity. Respondents did not refute that there is a conflict within the circuits caused by the Fifth Circuit's decision herein.

In addition, Petitioners have demonstrated that the U.S. Fifth Circuit utilized the incorrect standard of review. While the Fifth Circuit determined that it would review *de novo* the U.S. District Court's denial of the injunction under the relitigation exception to the Anti-Injunction Act, the Fifth Circuit incorrectly also subjected the District Court's factual findings to *de novo* review rather than evaluating these findings for clear error, as the Fifth Circuit previously had held in *Astron Industrial Associates, Inc. v. Chrysler Motors Corp.*, 405 F.2d 958 (5th Cir. 1968) and *Concerned Women for America v. Lafayette County*, 883 F.2d 32 (5th Cir. 1989). As this Court has emphasized, the reviewing court cannot supplant its view of the facts for that of the lower court if the lower court's findings of fact are plausible, even if the appellate court would have decided the matter differently. If both sets of findings of fact are feasible or credible, then the lower court's rendering of the facts cannot be clearly erroneous. *Anderson v. City of Bessemer*, 470 U.S. 564, 573, 105 S. Ct. 1504, 1511, 84 L. Ed. 2d 518 (1985) and *United States v. United States Gypsum Company*, 333 U.S. 364, 395, 68 S. Ct. 525, 542, 92 L. Ed 746 (1948).

THE FIFTH CIRCUIT ERRED IN DECIDING THIS CASE

In attempting to justify a finding of privity between the EEOC and Petitioners, Respondents are trying to penalize Petitioners for participating in the EEOC case as Charging Parties. The effect of Respondents' position would be to diminish

the ability of the EEOC to investigate and prosecute its cases of discrimination because charging parties would be punished in losing their right to individually prosecute their own claims of discrimination. By first filing their private lawsuits, Petitioners already had established that they wanted to prosecute their own claims. Respondents state that Petitioners filed affidavits in connection with the EEOC's opposition to Respondents' Motion for Summary Judgment and in favor of the EEOC's own motion. They sat in on the presentation of depositions. What petitioners did was what the EEOC should expect and receive from charging parties in the prosecution of a case in order to ferret out instances of discrimination. When the EEOC sought to expand the scope of its lawsuit, Petitioners did not solicit class members for the lawsuit. At the most critical juncture in the maintenance of the EEOC's lawsuit, Petitioners did not have any control in the EEOC's handling of its appeal of the granting of Respondents' Motion for Summary Judgment dismissing the EEOC's suit. Petitioners already had established by filing their lawsuit that they wanted to prosecute their own claims within their own suit.

Petitioners fiercely refute Respondents' contention on page 8 that "The EEOC vigorously represented Vines and McGraw in the Federal Suit." The EEOC's total abandonment of the briefing of the appeal of the original decision discredits this assertion by Respondents. The original Report and Recommendation by the Magistrate Judge recognized that there were material issues of fact concerning whether there was disparate treatment on the basis of age when Dr. Vines and Dr. McGraw were terminated. (Pet. App. at 1a.) In addition, the Magistrate Judge found that there were sufficient issues of material fact regarding whether Respondents' policy against the hiring of state retirees had a disparate impact on those over the age of 40. The District Judge rejected this report and recommendation and also concluded that the disparate impact theory was not viable under the ADEA. This Court specifically

rejected this position in *Smith v. City of Jackson*, No. 03-1160, __ U.S. __. __ S. Ct. __ (03/30/2005). The fact that the Magistrate Judge cogently conceptualized sufficient issues of material fact demonstrates that the EEOC had a reasonable basis for appeal. The refusal of the EEOC to brief the appeal manifests that it did not adequately represent Dr. Vines and Dr. McGraw as Charging Parties in the EEOC.

Examining the totality of the circumstances and the general theories and jurisprudence involving the law of representation, the EEOC cannot be construed to be the Petitioners' representative for the purposes of *res judicata* and collateral estoppel. Further, Respondents are incorrect in claiming that a judgment acquired by a government agency necessarily binds individuals. This Court already has addressed the question of whether a judgment acquired by the EEOC binds individuals in *General Telephone Company of the Northwest, Inc. v. EEOC*, 446 U.S. 318, 100 S. Ct. 1698 (1980) and determined that *res judicata* effects would not attach to EEOC judgments because of the statutory design. Although *General Telephone* involves an EEOC action under Title VII and not the ADEA, the justification for denying *res judicata* effects applies as well to the ADEA. This Court noted that under Title VII, individuals are allowed to maintain an individual action even when the EEOC files a lawsuit. Similarly, the ADEA in 29 U.S.C. § 626(c)(1) provides for individuals to file and maintain a lawsuit prior to that of the EEOC. Additionally, this Court in *Kimel*, 528 U.S. at 91-2, 120 S. Ct. at 650, explained that private plaintiffs retain their right to sue a state government under state antidiscrimination statutes. The enforcement scheme of the ADEA specifically supports the right and ability of individuals to prosecute their individual state law claims, even though they would not be able to relitigate a cause of action under the ADEA.

On page 10 of their opposition, Respondents imply that the EEOC in its predecessor case to *Victa v. Merle Norman*

Cosmetics, Inc., 19 Cal. App. 4th 454, 24 Cal. Rptr. 2d 117 (1993), only filed the action on behalf of the Charging Party for injunctive relief and not monetary damages, such that this avenue remained open for the individual Charging Party to pursue. This is patently incorrect. In *Victa*, the original Federal case by the EEOC sought backpay for the Charging Party, who was the plaintiff in the *Victa* state case. When the EEOC settled for an injunction only and agreed to a final judgment dismissing the action after a conference in chambers about the case, this constituted a final adjudication. The California state court reviewed the Federal jurisprudence and determined that no privity existed between the EEOC and the Charging Party because the interests of the EEOC and the Charging Party apparently diverged based upon the facts when the EEOC settled the case for injunctive relief only. Similarly, the factual circumstances herein demonstrate that the interests of the EEOC and Petitioners herein diverged, particularly when the EEOC refused to brief the appeal of the original U.S. District Court judgment granting summary judgment when the Magistrate Judge had issued a cogent Report and Recommendation to deny the Respondents a summary judgment. (Pet. App. herein.) The same U.S. District Court judge recognized this divergence of interests between the EEOC and Petitioners such that privity could not exist between them, and on that basis, he denied Respondents' motion for an injunction under the relitigation exception to the Anti-Injunction Act. Petitioners request that this Court grant their application for writ of certiorari to review the decision of the Fifth Circuit to grant the Respondents an injunction. The original decision by the U.S. District Court to deny the Respondents an injunction should be restored.

CONCLUSION

Based upon the jurisprudence and the facts, the petition should be granted.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

CIVIL ACTION NO. 97-0873

DWIGHT VINES, ET AL

VERSUS

NORTHEAST LOUISIANA UNIVERSITY, ET AL

JUDGE JAMES
MAGISTRATE JUDGE HAYES

REPORT AND RECOMMENDATION ON MOTION FOR PERMANENT INJUNCTION

Before the undersigned Magistrate Judge, on reference from the District Court, is a motion for permanent injunction filed by the defendants. (Document No. 285). For reasons stated below, it is recommended that the motion be **DENIED**.

The underlying facts of this matter have been set out numerous times in the record of these proceedings, and they will not be restated herein.

Defendants moved for a permanent injunction of the individual plaintiffs' state court proceedings on the grounds that this court dismissed the EEOC's federal complaint on summary judgment, and that the summary judgment on the federal claims was *res judicata* as to the individual plaintiffs'

state law claims. Prior to filing this motion, the defendants moved to dismiss the state court proceedings on the grounds of *res judicata.* The trial court granted that motion, but was reversed by the Second Circuit Court of Appeal. The defendants' application for writs to the Louisiana Supreme Court was denied.

A review of the ruling of the Louisiana Second Circuit shows that it is well-reasoned and persuasive. While recognizing that it had no precedential value in this state, the Second Circuit found persuasive and relied on the reasoning of *Victa v. Merle Norman Cosmetics*, 19 Cal.App. 4th 454, 24 Cal.Rptr.2d 17 (1993), in determining that there was no privity between the EEOC and the individual plaintiffs as follows:

> In this matter, after the Supreme Court decision in *Kimel*, the plaintiffs did not have the right to individually maintain an ADEA claim against a state agency. After *Kimel*, only the EEOC could prosecute the ADEA claim against the defendants in this case. Because the plaintiffs' individual ADEA claim had to be dismissed on those grounds, the federal court no longer had jurisdiction over the state claim which had been asserted by the plaintiffs. The matter was remanded to the state court. However, the *Kimel* decision specifically recognized the right of employees to sue under state statutory schemes. While the EEOC was the proper party to assert the ADEA claim, that agency did not prosecute any claim under state law. Further, as in *Victa*,

there is no showing that the EEOC had standing to prosecute such a claim under Louisiana law.

Also, we note that the EEOC apparently expanded the class of victims in the suit to include others similarly situated with the plaintiffs. The EEOC action was not prosecuted solely regarding the plaintiffs, and the commission was, in effect, representing the general public interest rather than those of the plaintiffs. Therefore, even under the reasoning of *Equal Employment Opportunity Commission v. United States Steel Corporation*, *supra*, it appears that *the* EEOC was not in privity with the plaintiffs because it sought to enjoin discrimination against a class of victims, not just the plaintiffs.

Further, the plaintiffs argue that they had no control over the conduct of the suit by the EEOC. They had no control over bringing or maintaining the ADEA action or in dismissing the appeal of the judgment against the EEOC.

Simply stated, the plaintiffs have a right to bring a suit under Louisiana's age discrimination statutes. The plaintiffs have not been afforded a full and fair opportunity to litigate their claims under state law and those claims have not been adjudicated on the merits. At the time the suit was brought, the plaintiffs sought to assert their state claims as well as federal claims. The state claims were remanded by the federal court on grounds of lack of jurisdiction. Under *Reeder v. Succession of Palmer*, *supra*, the plaintiffs did not fail to assert pendent state law claims.

All four elements of the *res judicata* test must be satisfied. Because there was no privity between the plaintiffs and the EEOC, we find that the parties in the two actions were not the same.

Vines v. Northeast Louisiana University, 839 So.2d 979, 985-89 (La.App. 2 Cir. 3/5/03), *writ denied*, 2003-1262 (La. 9/19/03).

It is recommended that this court adopt the above reasoning and DENY the motion for permanent injunction on the basis of lack of privity between the state court plaintiffs and the EEOC.

The individual plaintiffs also argue that, even if there was privity between the EEOC and the individual plaintiffs, the EEOC failed to adequately represent their claims, pointing out that the EEOC voluntarily dismissed its appeal of this court's granting of summary judgment. Under *Gonzales v. Cassidy*, 474 F.2d 67 (5th Cir. 1973), so long as an appeal could not be characterized as patently meritless or frivolous, the failure to prosecute the appeal means that the representative in the prior suit did not vigorously and tenaciously protect the interests of the represented parties.

Given the unsettled state of the law, the lack of clear precedent regarding disparate impact cases under the ADEA, and the report and recommendation from the undersigned finding that there were factual issues precluding summary judgment, the appeal in the federal case could not be characterized as patently meritless or frivolous. Thus, the defendants' motion for permanent injunction should be **DENIED** on this basis as well.

Appendix

Under the provisions of 28 U.S.C. §636(b)(1)(C) and F.R.C.P. Rule 72(b), the parties have **ten (10) business days** from service of this Report and Recommendation to file specific, written objections with the Clerk of Court. A party may respond to another party's objections within ten **(10) business days** after being served with a copy thereof. A courtesy copy of any objection or response or request for extension of time shall be furnished to the District Judge at the time of filing. Timely objections will be considered by the District Judge before he makes a final ruling.

A PARTY'S FAILURE TO FILE WRITTEN OBJECTIONS TO THE PROPOSED FINDINGS, CONCLUSIONS AND RECOMMENDATIONS CONTAINED IN THIS REPORT WITHIN TEN (10) BUSINESS DAYS FROM THE DATE OF ITS SERVICE SHALL BAR AN AGGRIEVED PARTY, EXCEPT ON GROUNDS OF PLAIN ERROR, FROM ATTACKING ON APPEAL THE UNOBJECTED-TO PROPOSED FACTUAL FINDINGS AND LEGAL CONCLUSIONS ACCEPTED BY THE DISTRICT JUDGE.

THUS DONE AND SIGNED at Monroe, Louisiana, this 3rd day of October, 2003.

s/ Karen L. Hayes
Karen L. Hayes
United States Magistrate Judge

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No. 04-1615

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DWIGHT VINES and VAN McGRAW,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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29 U.S.C. § 616(b)	9

The Solicitor General agrees with the Petitioners and establishes that the Fifth Circuit erred in concluding that there was privity between the Equal Employment Opportunity Commission and the Petitioners thereby using a judgment against the EEOC under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, *et seq.*, to act as a bar to Petitioners' state action age discrimination lawsuit under the doctrine of collateral estoppel. The Solicitor General correctly argues that the Fifth Circuit was wrong in its decision and that the Petitioners are truly aggrieved by that incorrect judgment enjoining their state age discrimination lawsuit under the relitigation exception to the Anti-Injunction Act, 28 U.S.C. § 2283.

However, the Solicitor General mistakenly contends that the potential impact of this erroneous decision does not merit this Court's plenary review. To the contrary, the Fifth Circuit's erroneous decision directly conflicts with decisions of other circuit courts. Where the Solicitor General further is mistaken in his analysis is in postulating that these circumstances are not sufficiently important or occurring frequently enough to warrant the consideration of this Court. Despite the Solicitor General's assertion, the resulting effect will be significant given that this ruling would provide a mechanism to eliminate the state law age discrimination claims of individual litigants against state employers without those litigants ever having had their day in court. Given that the Fifth Circuit's opinion involves a section of the ADEA that mirrors a provision in the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. § 201, *et seq.*, its ruling likely will reverberate beyond the ADEA to the FLSA.

A. The Fifth Circuit's Opinion on Collateral Estoppel Warrants Plenary Review because It Creates a Conflict within the Circuits.

A conflict exists between the circuits in two respects concerning the Fifth Circuit's decision. First, the Fifth Circuit posits a view of the right of a private litigant to prosecute a state age discrimination action filed prior to an ADEA action

by the EEOC which diverges from the interpretations of statutory construction of the applicable provisions in the ADEA in prior jurisprudence. Secondly, the Fifth Circuit's opinion strays from the existing case law regarding the discretionary application of the relitigation exception to the Anti-Injunction Act, generally, and as applied in the context of the ADEA and a state age discrimination lawsuit.

As the Solicitor General has demonstrated, the opinion of the Fifth Circuit is erroneous based upon the statutory history of the ADEA and the FLSA as well as the jurisprudence interpreting the statutes. The Fifth Circuit's decision is founded upon its particular interpretation of the legal question involving the existence of privity between the EEOC and a private litigant in the context of the issue of collateral estoppel. The judgment of the Fifth Circuit focuses on the legal question and does not depend upon the particular facts of the Petitioners' case. If this opinion of the Fifth Circuit is allowed to stand with the designation of "certiorari denied" as part of the citation, then it will either prompt other circuit courts to follow its incorrect reasoning or create a more definitive conflict in the circuit courts when other circuits attempt to rectify the Fifth Circuit's analysis.

In his brief, the Solicitor General proposed that whether there is a conflict in the circuits depends upon

> . . . whether Section 626(c) reflects a congressional intent to preserve a previously filed action as a fully independent remedy or whether it instead reflects a more limited purpose to provide a remedy that is unaffected by an EEOC judgment only when the individual action results in a judgment first or when the interests of the EEOC and the individual diverge.

With this latter interpretation, the Fifth Circuit has departed from Congressional intent and the jurisprudence by finding collateral estoppel to bar the individual employee's previously filed action unless there is a "clear divergence" of interests between the EEOC and the individual. The Petitioners have delineated that the circuit courts in *Burns v. Equitable Life*

Assurance Society of the United States, 696 F.2d 21 (2d Cir. 1982) and *EEOC v. Eastern Airlines, Inc.*, 736 F.2d 635 (11th Cir. 1984), have analyzed the issue by determining that Congress desired to retain a private litigant's ability to litigate despite litigation by the EEOC. In a situation completely analogous to the matter herein, the Ninth Circuit in *Merle Norman Cosmetics, v. Victa*, 936 F.2d 466 (9th Cir. 1991), reached a holding differing from that of the Fifth Circuit. Both the Ninth Circuit in *Merle Norman* and the Fifth Circuit herein were presented with a decision of the district court refusing to issue an injunction under the relitigation exception of the Anti-Injunction Act based on final judgment involving the EEOC. The Ninth Circuit found that the District Court's refusal to issue the injunction was within its discretionary power under the Anti-Injunction Act. By contrast, the Fifth Circuit did not recognize that the District Court's decision not to grant Respondents an injunction lay within its discretion.

The Second Circuit in *Burns* reviewed the legislative history of section 7(c) of the ADEA, 29 U.S.C. § 626(c)(1) to decide whether private suits under the ADEA were barred by a subsequent action pursuant to the ADEA by the EEOC. Noting that the ADEA also incorporates the procedures regulating enforcement of the Fair Labor Standards Act, the Second Circuit observed that the same language in this section of the ADEA originated in section 16(b) of the FLSA, 29 U.S.C. § 216(b) and provided that an employee's right to "bring" a lawsuit ceases when the official enforcing the FLSA initiates legal action. *Burns*, 696 F.2d at 23. The Second Circuit further explains that Congress is presumed to have knowledge of the interpretations given to an incorporated law, citing *Lorillard v. Pons*, 434 U.S. 575, 581, 98 S. Ct. 866, 870 (1978), and that this inference is stronger given the proximity in time between the passage of the two provisions and the specification of certain sections for inclusion. The Second Circuit determined in *Burns* that the ADEA provided for previously filed private litigation to continue even though there has been later litigation by the EEOC. The

Solicitor General suggests that the Second Circuit later in *EEOC v. Kidder, Peabody & Co.*, 156 F.3d 298 (2d Cir. 1998) ". . . adopted the view that the EEOC acts as a representative of private individuals when it seeks relief for them, and that view accords with the view of the court below." (Br. 14). However, the Second Circuit's view in *Kidder, Peabody* is circumscribed by the fact that the employees in *Kidder, Peabody* had handled their age discrimination claims through entering into binding arbitration agreements before the EEOC attempted to litigate on their behalf. These employees already had the opportunity to attempt to vindicate their own interests. This factual distinction underscores that individuals are entitled to handle their age discrimination claims without interference when they initiate the action before the EEOC litigation. This very opportunity is what the Petitioners seek with their lawsuit in state court.

The Eleventh Circuit also has articulated its interpretation of the viability of a private litigant's action in *Eastern Airlines* and it definitely runs counter to the Fifth Circuit's analysis. In the section of his brief demonstrating the error of the Fifth Circuit's conclusion that an EEOC judgment can bar a private employee's state action, the Solicitor General agreed with the reasoning of the Eleventh Circuit in *Eastern Airlines* that a subsequently filed EEOC lawsuit should not block an individual's litigation. Brief at 10. The specific language utilized by the Eleventh Circuit demonstrates that it believes that the private action must be allowed to continue to fruition, no matter the status of the EEOC lawsuit:

> Additionally, we disagree with Eastern's conclusion that Congress intended for an EEOC action enforcing the ADEA to cut off *previously* instituted private ADEA actions. Such a policy clearly would discourage attorneys from agreeing to file private ADEA actions on behalf of aggrieved individuals, since any such suit, no matter how close to resolution, or how much time spent, could be cut off by the EEOC filing a similar suit.

Eastern Airlines, 736 F.2d at 640. Later in his brief, the Solicitor General asserts that the Eleventh Circuit ". . . addressed only whether the commencement of an EEOC action terminates an individual's previously filed action, . . . and did not address the separate question whether a judgment against the EEOC operates as collateral estoppel in such an action." Brief at 15. However, as manifested in the opinion, the Eleventh Circuit articulates the chilling effect on the representation of private litigants by attorneys that would occur from utilizing the EEOC action to cut off a prior state action by individuals. This would include the use of an EEOC judgment to bar a private individual's litigation.

The Solicitor General incorrectly discounted the conflict that arises from the Fifth Circuit's decision with the prior holding of the Ninth Circuit in *Merle Norman*. There are clear parallels between the procedural history in the instant case and that outlined in *Merle Norman*. Both cases involved individuals who brought claims into state court prior to litigation by the EEOC. In each case, the determination in the EEOC action resulted in the dismissal of the claims for relief of the particular individuals on whose behalf the EEOC brought the action and the dismissal of the EEOC lawsuit with prejudice. The only pertinent difference is that the Ninth Circuit in *Merle Norman* appropriately allowed the District Court's refusal to issue an injunction to stand, while the Fifth Circuit substituted its evaluation for that of the District Court. The Solicitor General contends that "The Ninth Circuit never reached the question whether an EEOC judgment operates as collateral estoppel in an individual action brought under state law." Br. at 15. The Ninth Circuit never addressed this issue because it properly evaluated the question of the issuance of the injunction under the Anti-Injunction Act by referring to this Court's decisions in *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 108 S. Ct. 1684, 100 L. Ed. 2d 127 (1988), *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 474 U.S. 518, 106 S. Ct. 768, 33 L. Ed. 2d 552 (1986) and *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 97 S. Ct. 2881, 53 L. Ed. 2d 1009 (1977). The Ninth Circuit

explained that the issuance is discretionary by quoting from *Chick Kam Choo*, "the fact that an injunction *may* issue under the Anti-Injunction Act does not mean that it *must* issue." (emphasis included) *Chick Kam Choo*, 486 U.S. at 145, 108 S. Ct. at 1690.

In deciding whether to issue an injunction under the Anti-Injunction Act, the Ninth Circuit noted that ". . . district courts must be guided by 'general principles of equity, comity, and federalism,'" citing *Parsons Steel*, 474 U.S. at 526, 106 S. Ct. at 768, 88 L. Ed. 2d 877 (which also cited *Mitchum v. Foster*, 407 U.S. 225, 243, 92 S. Ct. 2151, 2162, 32 L. Ed. 2d 705 (1972). The Ninth Circuit concluded the following:

> . . . the district court acted entirely within its discretion when it determined that because nothing prevented Merle Norman from raising its defenses of res judicata or collateral estoppel in the California courts, it would not issue an injunction. State courts are just as capable as federal courts in applying applicable law. Doubts about the propriety of an injunction should be resolved "'in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy.'"

Merle Norman, 936 F.2d at 468, citing *Bechtel Petroleum v. Webster*, 796 F.2d 252, 253 (9th Cir. 1986), quoting *Vendo Co. v. Lecktro-Vend Corp.*, 433 U.S. at 630, 97 S. Ct. at 2881, 53 L. Ed. 2d at 1009. The Ninth Circuit endorsed its analysis concerning the relitigation exception as recently as December 19, 2005 in *Brother Records, Inc. v. Alan Jardine*, No. 04-55096, __ F.3d __ (9th Cir. 2005).

The Fifth Circuit clearly departed from this Court's standards for the issuance of an injunction under the Anti-Injunction Act. There was no consideration by the Fifth Circuit of the standards articulated by this Court in *Chick Kam Choo* about the discretionary nature of the injunctive remedy that the Respondents sought. The Fifth Circuit ignored the principles of equity, comity, and federalism in deciding to foreclose review of the issues of res judicata and collateral estoppel by the state courts, despite this Court's statements in *Parsons Steel* and *Leckro-Vend*.

Prior to *Merle Norman*, the Ninth Circuit in *Bechtel Petroleum* considered whether an injunction should issue to bar the state lawsuit of individual employees after the Secretary of Labor had brought an action for wage-hour claims under the FLSA. Noting the discretionary nature of the remedy, the Ninth Circuit also explained that the District Court was in a better position to evaluate the circumstances when it denied the injunction. The Ninth Circuit adopted the opinion of the District Court which determined whether the Secretary and the employees were in privity and whether the Secretary had any power to handle their state wage-hour claims. The Court in *Bechtel Petroleum* also observed that the state courts should be allowed to determine the issues of res judicata and collateral estoppel.

B. The Fifth Circuit's Opinion on Collateral Estoppel Warrants Plenary Review because of the Impact of This Issue on Private Litigants' Rights in Age Discrimination and Fair Labor Standard Act Litigation.

The Solicitor General clearly supports the position of the Petitioners that the Fifth Circuit improperly found privity between the EEOC and the Petitioners to justify imposing collateral estoppel to bar the Petitioners' state age discrimination lawsuit. He underestimates the breadth of the situations to which this ruling would apply. Following this Court's ruling in *Kimel v. Florida Board of Regents*, 528 U.S. 62, 120 S. Ct. 631, 145 L. Ed. 2d 522 (2000), private individuals were no longer allowed to sue a state under the ADEA. Only the EEOC was permitted to sue a state for age discrimination under the ADEA. This Court specified that the private individuals could only maintain an action in a state court for age discrimination pursuant to state law. Prior to the *Kimel* decision, private actions in Federal court under the ADEA could be consolidated with EEOC lawsuits pursuant to the same statute and the actions potentially could be prosecuted simultaneously. Since the holding in *Kimel* in 2000 and its reverberations through the cases pending in the circuit courts, there is greater opportunity and probability for

age discrimination litigation by the EEOC and private litigants to be conducted in two separate forums.

Since this Court's ruling in *Kimel* restricts individuals suing the state for age discrimination to actions under state statutes, the Fifth Circuit's ruling in this case bears most heavily on this class of litigants. The Fifth Circuit's decision presents litigants with a difficult choice. An individual suing the state for age discrimination must file a charge of discrimination with either the EEOC or the state fair employment practices agency. A litigant may be concerned about the integrity and validity of an investigation conducted by an agency of the state. Under the Fifth Circuit's holding, the filing of a discrimination charge with the EEOC brings with it the possibility of litigation by the EEOC and the prospect of being estopped from handling the litigation if the EEOC lawsuit is concluded first. Because the EEOC chooses to litigate in Federal court where litigation usually is concluded more quickly, there is a significant chance that the individual's state lawsuit would be rendered moot by the judgment in the EEOC litigation, even though he had no control over its handling. Although initially individuals will not be aware of the potential detrimental outcome from selecting the EEOC to investigate, the significance will be driven home when defendants, utilizing the Fifth Circuit's holding herein, block their private lawsuits with the relitigation exception. When presented with the consequences of each choice, private litigants may decide to forego informing the EEOC of allegations of age discrimination for fear of losing control of their personal claims. The EEOC then will lose the opportunity to appropriately enforce the ADEA with respect to state governmental entities and their employment practices.

The Fifth Circuit's opinion runs counter to the holding of this Court in *Kimel* that private litigants' claims of age discrimination against the state under state laws can be brought and maintained in state court separately and distinctly from lawsuits by the EEOC under the ADEA. *Kimel*, 528 U.S. at 91, 120 S. Ct. at 650. Allowing the Fifth Circuit's opinion to stand uncorrected would result in defendants having the ability to

determine against whom they will litigate first and in what forum. While the prior ruling of this Court in *EEOC v. Waffle House*, 534 U.S. 279, 296-97, __ S. Ct. __ (2002), will protect the enforcement authority of the EEOC when a private litigant has concluded litigation first, application of the Fifth Circuit's approach provides no such protection to individuals. With the Fifth Circuit's analysis, defendants could choose to litigate against the EEOC first and after a favorable judgment, stop individual employees in state court with the application of the relitigation exception.

Because the Fifth Circuit's ruling involves a provision of the ADEA, § 626(c,) that is similar to § 616(b) of the FLSA pertaining to the initiation of agency litigation, the reach of the incorrect holding by the Fifth Circuit extends to cases involving the FLSA. Under the FLSA, an employee may bring a personal cause of action for wage and hour claims in either state or federal court until the point that the Secretary of Labor initiates a lawsuit for such remedies. The employee may maintain the action if it was filed before the agency action. The Ninth Circuit in *Bechtel Petroleum* adopted the District Court's decision refusing to issue an injunction under the relitigation exception. Applying the Fifth Circuit's analysis would produce a different result than in *Bechtel Petroleum* with respect to the FLSA. Because of the comparable provisions, there are additional litigants affected by the Fifth Circuit's ruling as well as other circuit conflicts, such as *Bechtel Petroleum*.

The Solicitor General claims that "The importance of the issue is further diminished by the fact-specific limitation that the court of appeals placed on its preclusion holding. The court expressly held that its decision does not apply when there is a clear divergence of interest between the EEOC and the private individual, Pet. App. 10a-11a, such as where the EEOC settles for injunctive relief and abandons its claim for monetary relief." However, earlier in his brief, the Solicitor General underscored the potential for such divergence of interest based upon the nature of the role of the EEOC and the personal rights which an individual seeks to protect, a fact the Solicitor General admitted

occurred with the EEOC case. Brief at 11. "While the EEOC has authority to seek relief for age discrimination victims in its conduct of litigation, it is guided by the overriding public interest in eliminating unlawful discrimination, as well as other considerations such as available resources to pursue enforcement efforts, not the narrow interests of particular individuals." The tension stems from the fact that uppermost for the EEOC is the vindication of the public interest. Sometimes the public interest is synonymous with that of the private litigant, but frequently there is a difference between the goals of each. The Solicitor General has admitted in his brief that during litigation by the EEOC, the agency subordinates the interests of the individual to the EEOC's objectives, concerns and considerations.

Further, despite the claim that the court should consider whether there is a "clear divergence of interest," the Fifth Circuit failed to conduct its own test in the Petitioners' case. The U.S. District Court had made a factual finding that the EEOC had failed to adequately represent the Petitioners. The Fifth Circuit gave no explanation for rejecting this finding of fact by the District Court which had presided over the prior action between the EEOC and the Respondents. The failure of the Fifth Circuit to define its requirements for a "clear divergence of interest" when presented with the opportunity to explain its rejection of the District Court's factual finding manifests the importance of this Court correcting the analysis of the notion of privity between the EEOC and a private litigant.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court grant Petitioners' writ of certiorari for plenary review, or in the alternative, that this Court grant Petitioners' writ of certiorari and vacate the judgment of the court of appeals.

Respectfully submitted,

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No. 04-1615

In the Supreme Court of the United States

DWIGHT VINES AND VAN MCGRAW,
PETITIONERS

v.

UNIVERSITY OF LOUISIANA AT MONROE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether a judgment against the Equal Employment Opportunity Commission (EEOC) in an action under the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, that seeks relief for particular individuals operates as collateral estoppel in a state law action filed by those individuals before the EEOC initiated its action.

2. Whether the court of appeals erred in failing to defer to the Louisiana courts' resolution of that issue.

3. Whether a district court's determination that the EEOC was not in privity with an individual employee is subject to *de novo* or clear error review.

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 398 F.3d 700. The opinion of the district court (Pet. App. 24a-25a), and the report and recommendation of the magistrate judge (Pet. App. 26a-31a) are unreported.

STATEMENT

1. The Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. *et seq.*, makes it unlawful, subject to certain exceptions, for an employer to discriminate in employment because of an individual's age.

29 U.S.C. 623. The ADEA gives the Equal Employment Opportunity Commission (EEOC) the authority to enforce the Act's prohibitions. 29 U.S.C. 626(b). In addition, the ADEA authorizes any individual to initiate a civil action in any court of competent jurisdiction for legal or equitable relief. 29 U.S.C. 626(c)(1). The right of an individual to bring such an action, however, terminates if the EEOC commences an action to enforce the right of such individual under the ADEA. *Ibid.* ("[T]he right of any person to bring such action shall terminate upon the commencement of an action by the [EEOC] to enforce the right of such employee under this chapter.").

In States that have their own entities that investigate and afford remedies for age discrimination, an individual must bring an action before such an entity before filing suit under the ADEA. 29 U.S.C. 633(b). If an EEOC action is commenced with respect to the individual under the ADEA, however, "such action shall supersede any State action." 29 U.S.C. 633(a).

2. Petitioners Dwight Vines and Van McGraw retired from their positions at the University of Louisiana at Monroe (ULM) and began receiving retirement benefits under the Teachers' Retirement System of Louisiana. Pet. App. 2a. Thereafter, ULM rehired petitioners on a year-to-year basis, paying them a salary in addition to their retirement benefits. *Ibid.* In 1996, the University of Louisiana System (ULS) adopted a policy prohibiting full-time re-employment of retirees, and petitioners were informed that they would not be rehired for the 1996-1997 academic year. *Ibid.*

Petitioners filed suit against ULM and the Board of Supervisors of ULS (respondents) in the United States District Court for the Western District of Louisiana, alleging that respondents had engaged in discrimination

because of age in violation of the ADEA and Louisiana state law. Pet. App. 3a. Petitioners filed an identical action in Louisiana state court. *Ibid.* Respondents removed the state court action to federal court, where the cases were consolidated. *Ibid.*

Subsequently, the EEOC filed suit in federal court against respondents, alleging that respondents had discriminated against petitioners because of age in violation of the ADEA. Pet. App. 3a. The EEOC's action was consolidated with petitioners' action. *Ibid.*

The district court awarded partial summary judgment to respondents on petitioners' state law claims, holding that petitioners had failed to file the claims within the time allowed by state law. *Vines* v. *Northeast La. Univ.*, No. 97-cv-00873 (W.D. La. Aug. 3, 1999). In a later decision, the district court dismissed petitioners' remaining federal claims without prejudice based on the holding in *Kimel* v. *Florida Board of Regents*, 528 U.S. 62 (2000), that the Eleventh Amendment bars a private ADEA suit for damages against the State. *Vines* v. *Northeast La. Univ.*, No. 97-cv-00873 (W.D. La. May 25, 2000). The district court also severed the removed action and remanded it to state court. *Ibid.*

The district court subsequently granted summary judgment against the EEOC, rejecting the EEOC's disparate impact and disparate treatment claims. Br. in Opp. App. 1b-17b. The EEOC filed a notice of appeal, but voluntarily dismissed its appeal before filing a brief in the court of appeals. Pet. App. 3a.

3. Relying on the judgment against the EEOC, respondents filed a peremptory exception in state court arguing that petitioners' remanded action was barred by res judicata, collateral estoppel, or both. Pet. App. 3a-4a. The state trial court granted the exception, holding

that the EEOC and petitioners were in privity for purposes of both res judicata and collateral estoppel. *Id.* at 4a. The state court of appeal reversed and remanded. *Ibid.* The Supreme Court of Louisiana denied respondents' application for a writ of certiorari. *Ibid.*

4. Respondents returned to federal district court and sought an injunction under the Anti-Injunction Act, 28 U.S.C. 2283, that would prevent petitioners from continuing to litigate their state law claims.[1] The magistrate judge recommended that the district court deny respondents' motion on alternative grounds. Pet. App. 26a-31a. First, the magistrate judge recommended holding that the EEOC and petitioners were not in privity. *Id.* at 27a-29a. Second, the magistrate judge recommended holding that the EEOC's failure to appeal demonstrated that it had failed to represent petitioners adequately. *Id.* at 29a-30a. The district court adopted the magistrate judge's recommendation and denied respondents' motion for an injunction. *Id.* at 24a.

5. The court of appeals reversed. Pet. App. 1a-23a. The court first held that it was not required to give full faith and credit to the Louisiana appellate court's res judicata or collateral estoppel determinations. *Id.* at 7a-8a. The court explained that such determinations are entitled to full faith and credit only if they "would be given preclusive effect under Louisiana law." *Id.* at 7a. The court then found that the determinations would not be entitled to such effect, explaining that, under Louisiana law, a judgment is entitled to preclusive effect only if it is a final judgment and the Louisiana appellate court's determinations at issue in this case were the sub-

[1] The Anti-Injunction Act permits a federal court to enjoin state court proceedings "to protect or effectuate its judgments." 28 U.S.C. 2283.

ject of an "interlocutory judgment and thus not entitled to preclusive effect." *Id.* at 8a.

The court of appeals then held that collateral estoppel precludes petitioners from litigating the issue of age discrimination in state court because that issue had been resolved adversely to the EEOC in the federal action and petitioners were in privity with the EEOC. Pet. App. 8a-19a. The court added that the EEOC is not always in privity with an individual because the interests of the EEOC and individuals may diverge, and that the privity determination therefore must be made on a case-by-case basis. *Id.* at 10a-11a. The court found, however, that in this case "it is clear that the EEOC's interest did not diverge from that of [petitioners]." *Id.* at 11a.

The court of appeals also rejected petitioners' argument that the EEOC's decision to dismiss its appeal demonstrated inadequate representation. Pet. App. 20a-21a. The court concluded that the EEOC acted with due diligence and reasonable prudence in voluntarily dismissing its appeal. *Id.* at 21a.

DISCUSSION

A. The Collateral Estoppel Issue Does Not Warrant Plenary Review Given The Absence Of A Conflict And The Relative Infrequency With Which It Arises

Petitioners seek review of the question whether a judgment against the EEOC in an ADEA action that seeks relief for particular individuals operates as collateral estoppel in an action filed by those individuals under state law before the EEOC initiated its action. That question does not warrant review. While the court of appeals' analysis of that issue is incorrect, its decision does not directly conflict with the decision of any other court of appeals, and the issue does not arise with suffi-

cient frequency, or have sufficient importance, to warrant review in the absence of a conflict.

1. a. "It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Hansberry* v. *Lee*, 311 U.S. 32, 40 (1940). An exception to the general rule exists when a person, "although not a party, has his interests adequately represented by someone with the same interests who is a party." *Martin* v. *Wilks*, 490 U.S. 755, 762 n.2 (1989). In such circumstances, a judgment against a person's representative is binding on the person. See Restatement (Second) of Judgments § 41(1) (1982). For example, because the trustee of an estate represents the interests of the beneficiaries, a judgment against the trustee is binding on the beneficiaries. *Richter* v. *Jerome*, 123 U.S. 233, 246 (1887). Similarly, a judgment against an adequate class representative may be binding on members of the class. *Hansberry*, 311 U.S. at 41-42.

The principle of representative preclusion may also apply when a public entity is invested by law with authority to represent a person's interests. Restatement (Second) of Judgments, *supra*, § 41(1)(d). For example, in *Heckman* v. *United States*, 224 U.S. 413, 445-446 (1912), the Court held that a judgment in a case brought by the United States on behalf of Indians to set aside an illegal conveyance would be binding on the Indians. Public actions that seek relief for particular individuals, however, do not always bind the individuals. To the contrary, when "the remedies that a public official is empowered to pursue [are] * * * interpreted as being supplemental to those which private persons may pursue themselves, * * * the official's maintenance of an action

does not preclude other litigation by the persons affected." Restatement (Second) of Judgments, *supra*, § 41 cmt. d, at 397.

In *General Telephone Co. of the Northwest* v. *EEOC*, 446 U.S. 318, 326 (1980), the Court held that the EEOC's actions under Section 706 of Title VII of the Civil Rights Act of 1964 fall into the category of representative actions that do not preclude litigation by the persons affected. In particular, the Court held that such actions are not "representative actions" under Federal Rule of Civil Procedure 23. The Court reached that conclusion both because Title VII gives individuals a right to file their own actions, and because although the EEOC can secure specific relief for discrimination victims, in making its litigation decisions, "[the EEOC] is guided by the overriding public interest." 446 U.S. at 326 (internal quotation marks omitted). See *ibid.* ("When the EEOC acts, albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing employment discrimination.").

In *General Telephone*, the Court also squarely rejected the argument that an EEOC judgment precludes subsequent actions by individual employees. The Court explained that "[i]n light of the general intent to accord parallel or overlapping remedies against discrimination," it was "unconvinced that it would be consistent with the remedial purpose of the statutes to bind all 'class' members with discrimination grievances against an employer by the relief obtained under an EEOC judgment or settlement against the employer." 446 U.S. at 333 (internal quotation marks omitted). The Court viewed that as "especially true given the possible differences between the public and private interests involved." *Ibid.* The Court specifically noted that "the

EEOC is authorized to proceed in a unified action and to obtain the most satisfactory overall relief even though competing interests are involved and particular groups may appear to be disadvantaged." *Id.* at 331. See *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279, 296-297 (2002) (reaffirming that the EEOC may seek to further the public interest through awards of victim-specific relief, and that when it does so, it "does not stand in the employee's shoes").

While an EEOC judgment in a Title VII case is not binding on individual employees, courts are not "powerless to prevent undue hardship to the defendant." General *Tel.*, 446 U.S. at 333. The courts "can and should preclude double recovery by an individual." *Ibid.* And "where the EEOC has prevailed in its action, the court may reasonably require any individual who claims under its judgment to relinquish his right to bring a separate private action." *Ibid.* See *Waffle House, Inc.*, 534 U.S. at 297 (citing *General Tel.*).

b. The court of appeals in this case held that a different preclusion rule applies to individual actions brought under the ADEA because of the ADEA's different enforcement structure. Pet. App. 10a-12a. In particular, the court pointed to 29 U.S.C. 626(c)(1), which terminates an individual's right to file an ADEA action once the EEOC files a suit under the ADEA that seeks relief for that individual. In the court's view, that provision demonstrates that the EEOC is in privity with an individual when it seeks relief for that individual. Pet. App. 11a-12a. That reasoning, however, is at odds with the text and history of Section 626(c)(1).

Section 626(c)(1) specifies that the commencement of an EEOC action terminates "the right of any person to *bring* [an ADEA] action." 29 U.S.C. 626(c)(1) (emphasis

added). It does not state that the commencement of an EEOC action terminates the right of a person to *maintain* an ADEA action that was brought *before* the EEOC filed suit. Moreover, interpreting Section 626(c)(1) to cut off an individual's right to maintain an existing private action in those circumstances would be directly at odds with the history of Section 626(c)(1).

Section 626(c)(1) was modeled on a similar provision in the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 216(b), which was added to the FLSA in 1961. See *EEOC* v. *U.S. Steel Corp.*, 921 F.2d 489, 494 n.4 (3d Cir. 1990); *Burns* v. *Equitable Life Assurance Soc'y of the U.S.*, 696 F.2d 21, 23 (1982), cert. denied, 464 U.S. 933 (1983). The legislative history to Section 216(b) makes clear that it was not intended to terminate an action that was filed *before* the Secretary of Labor filed suit. H.R. Conf. Rep. No. 327, 87th Cong., 1st Sess. 20 (1961). Rather, "[c]ongressional reports suggest that although an employee may no longer initiate a new action once the Secretary has sued, an employee may continue to litigate, *i.e.*, 'maintain,' an action already pending." *Breuer* v. *Jim's Concrete, Inc.*, 538 U.S. 691, 695 n.1 (2003) (citing reports).[2]

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[2] The pertinent committee report accompanying the FLSA provision states:

> The bringing of an action by the Secretary seeking such relief with respect to such compensation owing to any employee would, after filing of the complaint in the Secretary's action, preclude such employee from becoming a party plaintiff in a private action to recover the amounts due and an additional equal amount as liquidated damages. The filing of the Secretary's complaint against an employer would not, however, operate to terminate any employee's right to maintain such a private suit to which he had become a party plaintiff *before* the

The general rule is that when a legal provision is transplanted from one source, "it brings the old soil with it." *Evans* v. *United States*, 504 U.S. 255, 260 n.3 (1992) (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947)). And here, Congress explicitly provided that the provisions of the ADEA "shall be enforced in accordance with the powers, remedies, and procedures provided in [the FLSA]," including those set forth in Section 216(b) of the FLSA. 29 U.S.C. 626(b). Accordingly, Section 626(c) of the ADEA must be construed in accordance with Section 216(b) of the FLSA. See *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978).

Section 626 carefully balances an employer's interest in avoiding duplicative litigation against an individual's interest in having his own day in court, and strikes the balance differently depending on whether the individual initiates her own suit before or after the EEOC commences suit. In that way, Section 626 forecloses the filing of suits by attorneys who "seek to reap the benefits of the EEOC's success," but does not discourage attorneys from agreeing to file private ADEA actions out of fear that, "no matter how close to resolution, or how much time spent," the suit "could be cut off by the EEOC filing a similar suit." *EEOC* v. *Eastern Airlines*, 736 F.2d 635, 640 (11th Cir. 1984).

Because of the history of Section 626(c)(1) and its limited scope and purpose, the court of appeals erred in concluding that it reflects a congressional intent to bind individuals, such as petitioners here, who have filed suit *before* the EEOC commences suit to the results of an

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Secretary's action.

H.R. Conf. Rep. No. 327, *supra*, at 20 (emphasis added).

EEOC judgment. To the contrary, because Section 626 preserves the right of such individuals to maintain their own ADEA actions, when they are brought before the EEOC commenced suit, the more natural inference is that Congress viewed the individual and EEOC actions in that context as "parallel or overlapping remedies against discrimination," *General Tel.*, 446 U.S. at 333, just as is true in the Title VII context (at issue in *General Telephone*) and in the FLSA context.

That is particularly true because the EEOC's role in ADEA actions is no different from its role in Title VII actions. While the EEOC has authority to seek relief for age discrimination victims in its conduct of litigation, it is guided by the overriding public interest in eliminating unlawful discrimination, as well as other considerations such as available resources to pursue enforcement efforts, not the narrow interests of particular individuals. The EEOC's decision not to appeal the judgment against it in this case is illustrative. In making that decision, the EEOC considered whether it would be in the *public's* interest to appeal, not whether it would be in *petitioners'* interests to appeal. In addition, the prospect of obtaining an adverse precedent in the court of appeals would obviously weigh more heavily in the EEOC's calculus than in an individual's decision to appeal.

While EEOC actions and previously filed individual actions are distinct, rather than mutually exclusive, remedies for unlawful discrimination, that does not mean that individuals may use individual actions to obtain additional relief. As is true under Title VII, a court may preclude an individual from double recovery under the ADEA, and it may condition an award under an EEOC judgment on an individual's agreement to relinquish his individual claim. But the court of appeals erred in hold-

ing that a judgment against the EEOC in an ADEA action operates as collateral estoppel in an action filed by an individual under state law before the EEOC itself commenced suit under the ADEA.

2. Nonetheless, review of the court of appeals' holding on that issue is not warranted. There is no square conflict in the circuits on that issue, and the issue does not arise with sufficient frequency, or have sufficient importance, to warrant review absent such a conflict.

a. Petitioners contend (Pet. 12, 19-20; Reply 6) that the decision below conflicts with the Second Circuit's decisions in *Dunlop* v. *Pan American World Airways, Inc.*, 672 F.2d 1044 (1982), and *Burns;* the Ninth Circuit's decision in *Merle Norman Cosmetics, Inc.* v. *Victa*, 936 F.2d 466 (1991); and the Eleventh Circuit's decisions in *Eastern Airlines* and *Riddle* v. *Cerro Wire & Cable Group, Inc.*, 902 F.2d 918 (1990). The decision below, however, does not conflict with any of those decisions.

In *Dunlop*, the Second Circuit held that the Secretary of Labor—who was responsible for enforcing the ADEA before that authority was transferred to the EEOC—lacked authority under Section 633(a) to extinguish a state law claim through a settlement with an employer. 672 F.2d at 1049 n.7, 1051. The court had no occasion to address whether the Secretary and an individual employee were in privity so that an issue resolved in a fully litigated ADEA judgment against the Secretary would have a collateral estoppel effect in a state law suit filed by the individual before the Secretary com-

menced suit. As a result, *Dunlop* did not address the preclusion issue presented in this case.[3]

Furthermore, since its decision in *Dunlop*, the Second Circuit has held that when an individual signs an agreement to arbitrate an ADEA claim, the EEOC may not seek monetary remedies for that individual. *EEOC* v. *Kidder, Peabody & Co.*, 156 F.3d 298, 303 (1998). In so holding, the court relied on the Third Circuit's holding in *U.S. Steel* that the ADEA's enforcement structure demonstrates that Congress intended the EEOC to serve as representative when it seeks relief for that individual. *Kidder, Peabody*, 156 F.3d at 302. That reasoning accords with, rather than conflicts with, the reasoning of the court of appeals in this case.

The Second Circuit's decision in *Burns* also does not conflict with the decision below. In that case, the EEOC filed an ADEA action several years after private individuals filed such an action. The EEOC originally named those individuals as aggrieved employees, but later agreed to dismiss any claim seeking relief for them. After the EEOC filed suit, the employer moved to dismiss the suit filed by the individuals based on the argument that Section 626(c)(1) requires the dismissal of pending private actions when the EEOC files suit. The Second Circuit rejected that claim, holding that under Section 626(c)(1), the commencement of an EEOC action

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[3] Even without regard to privity, there would have been no basis for asserting that res judicata or collateral estoppel barred the state law claims at issue in *Dunlap*. The settlement could not have had a res judicata effect because the Secretary had no authority to bring a state law claim, Pet. App. 19a n.10, and it could not have had a collateral estoppel effect because there were no common issues of law or fact that were actually litigated and finally resolved by the settlement. *Id.* at 6a.

does not affect previously filed private suits. 696 F.2d at 23-24.

Because *Burns* addressed only the question whether the *filing* of an EEOC action terminates a previously filed action by virtue of Section 626(c)(1), and did not address whether a *judgment* in an EEOC action can operate as collateral estoppel in such an action, it does not conflict with the decision below. The latter issue depends on the resolution of the further question—whether Section 626(c) reflects a congressional intent to preserve a previously filed action as a fully independent remedy or whether it instead reflects a more limited purpose to provide a separate remedy that is unaffected by an EEOC judgment only when the individual action results in a judgment first or when the interests of the EEOC and the individual diverge. In addition, the latter issue requires consideration of this Court's precedents, such as *General Telephone*, discussing the preclusive effect of actions undertaken by the government that seek relief for particular individuals. Moreover, as discussed above, the Second Circuit in *Kidder, Peabody* adopted the view that the EEOC acts as a representative of private individuals when it seeks relief for them, and that view accords with the view of the court below.

The Ninth Circuit's decision in *Merle Norman* also does not conflict with the decision below. In that case, Victa brought a state law claim in state court. The EEOC subsequently filed its own ADEA action seeking relief for Victa and entered into a consent decree that provided for injunctive relief, but did not provide make-whole relief to Victa. See *Victa* v. *Merle Norman Cosmetics, Inc.*, 24 Cal. Rptr. 2d 117 (Ct. App. 1993). The employer sought to enjoin the litigation of Victa's state law claim on the ground that the EEOC's judgment pre-

cluded Victa from litigating it. The district court refused to issue an injunction, and the Ninth Circuit affirmed. After expressing doubts that Victa's state law claim was actually decided by the EEOC's judgment, the court of appeals upheld the district court's refusal to issue an injunction on the ground that the employer could litigate that issue in state court and doubts about the propriety of issuing the injunction should be resolved in favor of allowing the state court to act. *Merle Norman*, 936 F.2d at 468. The Ninth Circuit never reached the question whether an EEOC judgment operates as collateral estoppel in an individual action brought under state law.

Nor is there any conflict between the decision below and the Eleventh Circuit's decisions. *Eastern Airlines*, like the Second Circuit's *Burns* decision, addressed only whether the commencement of an EEOC action terminates an individual's previously filed ADEA action. The Eleventh Circuit, consistent with the Second Circuit, held that it does not, 736 F.2d at 639-641, and did not address the separate question whether a judgment against the EEOC operates as collateral estoppel in such an action. In *Riddle*, the Eleventh Circuit held that a consent decree entered into by the EEOC did not operate as res judicata or collateral estoppel in a subsequently filed private action. *Riddle*, however, involved a Title VII suit, not an ADEA suit, and it therefore does not conflict with the court of appeals' decision in this ADEA case.

b. The question presented does not arise with sufficient frequency to warrant the Court's review in the absence of a clearly developed circuit conflict. During the nearly 40 years since the enactment of the ADEA, the question whether an EEOC judgment has a res judi-

cata or collateral estoppel effect on a previously filed state law action has arisen only rarely. Nor is the issue likely to arise with any frequency in the future. Over the past ten years, the EEOC has filed between 21 and 41 ADEA cases each year, and in cases where the EEOC has filed, there has rarely been a previously filed private action. There is no reason to conclude that the instances of parallel EEOC and private litigation will increase in the future. Moreover, even in the rare cases in which there is parallel litigation, the collateral estoppel issue could arise only when the cases are not consolidated and resolved together, and even then, only when the individual is sufficiently dissatisfied with the resolution achieved in the EEOC action and sufficiently optimistic about the chances for a different result to be willing to bear the costs of further litigation.

The importance of the issue is further diminished by the fact-specific limitation that the court of appeals placed on its preclusion holding. The court expressly held that its decision does not apply when there is a clear divergence of interest between the EEOC and the private individual, Pet. App. 10a-11a, such as where the EEOC settles for injunctive relief and abandons its claim for monetary relief. *Id.* at 13a-14a; see *id.* at 10a-11a ("[T]he EEOC is not *always* to be considered the representative of individuals on whose behalf it brings an ADEA action"; "[i]n a situation where there is a clear divergence of interests between the EEOC and the aggrieved individual, we must determine *in each case* whether privity exists.") (emphasis added).

For the reasons discussed above, an approach that presumes that there is privity between the EEOC and a private individual unless the court can identify a clear divergence of interests is not consistent with a proper

understanding of the ADEA's enforcement structure. But the exception to the court's ruling for cases where there is a clear divergence of interests may materially ameliorate the potentially harmful consequences of the decision. That exception, together with the absence of a conflict in the circuits and the infrequency with which the issue arises, counsels against granting plenary review of the first question in this case.

B. The Remaining Questions Presented Do Not Implicate Any Conflict And Do Not Warrant Plenary Review

Petitioners also seek review of two additional questions. The first is whether the court of appeals erred in failing to defer to a state appellate court determination that the EEOC's judgment does not have a collateral estoppel effect on petitioners' state law action. Pet. ii. That question also does not warrant review.

The Full Faith and Credit Act requires federal courts to give state judicial proceedings "the same full faith and credit * * * as they have by law or usage in the courts of such states." 28 U.S.C. 1738. In *Parsons Steel, Inc.* v. *First Alabama Bank*, 474 U.S. 518, 524 (1986), the Court held that Section 1738 applies to state law determinations on the res judicata effect of a federal judgment. Accordingly, "[o]nce the state court has finally rejected a claim of res judicata, then the Full Faith and Credit Act becomes applicable and federal courts must turn to state law to determine the preclusive effect of the state's court's decision."

Applying *Parsons*, the court of appeals in this case correctly held that it was not required to give full faith and credit to the state appellate court's determination that the EEOC's judgment did not have a preclusive effect on petitioners' state law action. Louisiana law

gives preclusive effect only to judgments that are final; the state appellate court's collateral estoppel determination in this case, however, was interlocutory rather than final. As a result, a federal court was not required to give full faith and credit to the state court's collateral estoppel determination. Pet. App. 7a-8a.

Petitioners argue (Reply 5) that principles of comity and federalism nonetheless required the court of appeals to defer to the Louisiana appellate court's determination. But absent the command of the Full Faith and Credit Act, a federal court is not required to defer to a state court determination on the preclusive effect of the federal court's own judgment. In that circumstance, the Anti-Injunction Act, 28 U.S.C. 2283, expressly authorizes a federal court to make its own determination. While there may be circumstances in which it would be appropriate for a federal court to exercise its discretion to allow the effect of its judgment to be resolved in the state courts with the possibility of further review in this Court, *Parsons*, 474 U.S. at 526, the question whether this is such a case is fact-bound, does not implicate any conflict among the circuits, and does not present any issue of recurring importance.

The last question presented by the petition (Pet. 25-29) is whether the court of appeals was required to apply a clear-error standard of review to the district court's determination that the EEOC was not in privity with petitioners. Review of that question is not warranted. The resolution of the privity issue in this context is a question of federal law subject to do novo review, not a question of fact subject to clear-error review. Petitioners cite no authority that would support a contrary conclusion. Moreover, to the extent there is a subsidiary question of how a court of appeals should conduct the

case-specific privity inquiry fashioned by the Fifth Circuit below (which itself is erroneous for the reasons stated at pp. 6-12, *supra*), that subsidiary question does not merit review for all the reasons that the more fundamental preclusion issue does not justify plenary review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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